No. 80-6702

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

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SUPREME COURT, U.S.

ROBERT ALTON HARRIS,

PETITIONER,

VS.

STATE OF CALIFORNIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner, because of community saturation with massive advance pre-trial publicity, was deprived of due process of law through the failure of the trial court to order a change of venue?

2. Whether petitioner was deprived of his Sixth Amendment right to trial by jury and his Fourteenth Amendment right to due process of law through the introduction of psychiatric testimony at the penalty phase of his trial?

3. Whether the 1977 California death penalty statute violates the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment?

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF CALIFORNIA

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Robert Alton Harris, respectfully prays that a writ of certiorari issue to review the judgment of the California Supreme Court issued on February 11, 1981, affirming his conviction and sentence of death. Petitioner's petition for rehearing before the Supreme Court of California was ordered denied on March 20, 1981.

OPINION BELOW

The opinion of the Supreme Court of California affirming petitioner's conviction and his sentence of death is reported at 28 Cal.3d 935 (1981), and is attached as Exhibit A to this petition. The order of the Supreme Court denying petitioner's timely petition for rehearing in that court is attached as Exhibit B to this petition. As Exhibit B indicates, the petition for rehearing was denied on March 20, 1981.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1254 and Rule 17 of the Rules of this court.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment provides

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

A. The 1977 Legislative Enactments Which Are Applicable to Petitioner's Case.

Penal Code, Section 190.2 provides:

> The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true.
>
> * * *
>
> (e) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists.
>
> * * *
>
> (3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:
>
> * * *
>
> (v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.
>
> * * *
>
> (5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of

murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree.

Penal Code, Section 190.3 provides:

If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true... the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force of violence, and the defendant's character, background, history, mental condition and physical condition.

* * *

In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crimes of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the affects of intoxication.

(h) The age of the defendant at the time of the crime.

(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole.

STATEMENT OF THE CASE

The petitioner, Robert Alton Harris, was convicted after a jury trial of the offenses of kidnapping, robbery and first degree murder of John Mayeski and Michael Baker in violation of the California Penal Code Sections 187, 189, 190, 209(BO, and 211. In addition petitioner was also convicted of receiving stolen property in violation of California Penal Code Section 496(1), and of possession of a concealable firearm by an ex-felon in violation of California Penal Code Section 12021. Prior to the impanelment of the jury in this case, petitioner admitted this latter offense and an additional allegation that he had served a prior prison term for manslaughter, a "violent felony" within the meaning of California Penal Code Section 667.5(c). As to each of the kidnapping, robbery and murder counts alleged to have been perpetrated against each of the victims the jury found petitioner was armed with a firearm in violation of Penal Code Section 12022, personally used a firearm within the meaning of Penal Code Sections 1203.06 and 12022.5, and personally inflicted great bodily injury upon his victim in violation of California Penal Code Section 12022.7.

The jury at the guilt phase of trial also found that special circumstances existed as to each of the homicides of

which petitioner was convicted in that petitioner was convicted in this proceeding of more than one first degree murder [California Penal Code Section 190.2(c(5)], and each of the murders was willful, deliberate, premeditated and committed during the commission of kidnapping and robbery [California Penal Code Section 190.2(c)(3)(i-iii).

At the penalty phase of the trial, the jury fixed the penalty at death. The sentence of death was thereafter imposed upon petitioner by the trial judge. Judgment and sentence were automatically appealed to the California Supreme Court and the judgment and sentence were affirmed.

STATEMENT OF THE FACTS

Petitioner adopts the Statement of the Facts contained in the opinion of the California Supreme Court which is attached hereto as Exhibit A. (Please see the dissenting opinion of Chief Justice Bird for facts relating to petitioner's pretrial motion for change of venue.) (Slip opinion, pages

REASONS FOR GRANTING THE WRIT

PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW BY THE REFUSAL OF THE TRIAL COURT TO ORDER A CHANGE OF VENUE FOR THE TRIAL OF THE CASE.

The plurality opinion of the Supreme Court of California clearly recognizes the federal constitutional implications of the denial of petitioner's pretrial motion for change of venue. See, Shepherd v. Maxwell, 384 U.SC. 333 (1966); Estes v. Texas, 381 U.S. 532, 540 (1965); Irvin v. Dowd, 366 U.S. 717, 722 (1961). However, in its analysis of the factors involved in considering whether a criminal defendant has demonstrated the requisite "reasonable likelihood" that prejudicial pretrial publicity would render a fair trial unobtainable, the plurality opinion fails to accurately analyze the record made in the trial court concerning this issue.

The plurality opinion initially states, "the factors to be considered [in determining whether a change of venue was erroneously denied] are the nature and gravity of the offense, the nature and extent of the news coverage, the size of the

community, the status of the defendant in the community, and the popularity and prominence of the victim." People v. Salas (1972) 7 Cal.3d 812, 818. (Slip Opinion, pages 11-12). The plurality opinion then analyzes the record in light of these factors and properly concludes that two of them -- the gravity of the offense and the nature and extent of news coverage -- militated in favor of a change of venue in the instant case. However, the opinion improperly and incorrectly concludes that two other factors --status of the defendant in the community, and the popularity and prominence of the victim -- were neutral. (Slip Opinion, page 12). While the two victims in this case were relatively unknown outside of their immediate community prior to the slayings, as Chief Justice Bird points out in her dissent, "their virtues were . . . made known to the county at large following their deaths, and the community's warm sympathy was displayed county wide." (Slip Opinion, page 24, footnote 10). Thus, as of the time of trial, the news media had deluged the public with the recurring image of two innocent teenage boys on their way to a fishing trip ciciously gunned down by a cold-blooded, sadistic killer.

Similarly, the record in this case belies the contention of the plurality that the status of petitioner in the community was also a neutral factor. Again, the Chief Justice in her dissent correctly points out that although appellant had lived and worked in the San Diego area prior to the killing, he was usually portrayed by the press as being "from Visalia" and, "was no more integrated into the community than was the defendant in Fain, supra, (Fain v. Superior Court (1970) 2 Cal.3d 46, 54) whose minimal community ties were held to be a factor favoring a change of venue." (Slip Opinion, page 23, footnote 9). The record, when analyzed in terms of the community's perception of appellant and his victims, unequivocally shows that both of the factors characterized by

the majority as being "neutral" in fact weighed heavily in favor of a change of venue.

Apart from this fundamental error in this analysis of the record developed in the trial court with respect to this issue, the plurality opinion improperly gives full credance to protestations of impartiality made by members of the prosepective jury panel as well as by jurors ultimately impaneled to try the case. Based upon these protestations of impartiality, the plurality opinion assesses the impact of the massive pretrial publicity which accompanied this case in San Diego County as not having "the effect of denying defendant his right to a fair and impartial jury." (Slip Opinion, pages 14-15).

The question of whether juror protestations of impartiality negate the necessity of a venue change has been before the courts of this land numerous times. The unanimous judicial response has been that "the juror's assurances that he is equal to the task cannot be dispositive of the accused's rights" (Murphy v. Florida, 421 U.S. 794, 800 (1975), and most courts have viewed such protestations with a "healthy skepticism." (See, United States v. Williams, 568 F.2d 464, 471, fn. 16 (5th Cir. 1978).) Indeed, the California Supreme Court itself has recognized in People v. Tidwell, 3 Cal.3d 62, 73 (1970), the unreliability of these self-serving declarations of impartiality:

> Although all of the jurors selected claim the ability to sit impartially, such a claim is of course not conclusive. No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "you can't forget what you hear and see." (Irvin v. Dowd, 366 U.S. 717, 723 (1961)). See also, Marshall v. United, 360 U.S. 310, 312-313 (1959); Rideau v. Louisiana, 373 U.S. 723, 727 (1963).).

As the Chief Justice points out in her dissent, 90% of the venire admitted having some information about the case ranging from vague recollections to certainty of petitioner's guilt. Moreover, at least eight of the twelve jurors ultimately impaneled had been exposed to prejudicial pretrial publicity or discussion concerning the case taking place in the jurors' lounge during recesses. Further, petitioner exhausted all twenty-six of his peremptory challenges, and twenty-four of those twenty-six challenges were directed to persons who had some knowledge of the case. (Slip Opinion, pages 16-17).

Indeed, the Chief Justice of this court, in oral argument in a case decided this term (Rosales Lopez v. United States, ____U.S.____ (No. 79-6624, April 21, 1981), expressed grave reservations concerning the wisdom of blindly crediting juror disclaimers of bias or prejudice. Faced with this record, and the inherent unreliability of juror disclaimers of bias, the plurality's conclusion that the petitioner failed to shoe the requisite "reasonable likelihood" that he could not receive a fair trial in San Diego County is clearly erroneous.

Apart from denying petitioner the "fair trial in a fair tribunal" to which he was entitled (In re Myrchison, 349 U.S. 133, 136 (1955)), the pervasive prejudicial pretrial publicity in this case undoubtedly had the additional effect of coloring the jury's determination as to penalty. Unlike the normal criminal case, the jury in a capital case must necessarily be guided by more subjective and personal parameters when the guilt of the accused has been saitsfied to the jury's satisfaction beyond a reasonable doubt and it must deal with whether or not the death penalty is appropriate. (See Adams v. Texas, ____U.S.____, 65 L.Ed. 581, 590 (1980)).

As the Chief Justice notes in her dissent, where prejudicial pretrial publicity deluges the community, the likelihood of the jurors being able to dispassionately and fairly

determine whether the death penalty is warranted is substantially diminished. Thus, the refusal to grant a change of venue in this case resulted not only in the denial of a fair trial to petitioner, but also impermissibly influenced the jury's determination that the death penalty was the appropriate punishment.

II

THE ACTION OF THE TRIAL COURT IN PERMITTING THE INTRODUCTION OF PSYCHIATRIC TESTIMONY AS TO PETITIONER'S TRUTH AND VERACITY AT THE PENALTY PHASE OF HIS TRIAL DEPRIVED HIM OF DUE PROCESS OF LAW.

At the penalty phase of petitioner's trial, petitioner took the witness stand in his own behalf and admitted that he had in fact killed the two victims, bu expressed remorse for his actions. In rebuttal, the prosecution presented the testimony of Dr. Wait Griswold who testified that he had examined the defendant personally and his background and that he had diagnosed appellant as an "anti-social personality," the diagnosis also referred to as "sociopathic personality". After having placed this label upon appellant, Dr. Griswold testified that sociopathic persons such as petitioner demonstrate a manipulative personality. Further, Griswold testified that he would not expect a sociopath such as petitioner to truly feel remorse for the crimes which he had committed. Rather, he would expect such a person to feel remorse only for having been arrested and convicted of those offenses. He also indicated in response to questioning by the district attorney that a sociopath such as petitioner has the power to control himself and the capacity to appreciate the criminality of his acts. Further, in response to the prosecutor's question, "If a person were truly a sociopath and had committed the crime of the type that you discuss [with defendant] would you expect that person to truly feel remorse for those crimes?" Dr. Griswold replied, "No, I would not." Defense counsel on cross

examination, then asked Dr. Griswold, "So you venture no opinion whether or not he is remorseful at this time?" Dr. Griswold responded, "No opinion, except that I would doubt it very much."

In dealing with petitioner's contention, raised in his automatic appeal to the Supreme Court of California, that this testimony invaded the province of the jury by usurping its function of determining the credibility of the witnesses, Justice Clark, speaking for the plurality, found that because Dr. Griswold carefully framed his testimony to deal with the manifestations of a sociopathic personality and not directly to petitioner, no usurpation of the jury's function in determining the credibility of the witnesses took place. Justice Clark also noted that the only direct comment upon the defendant's lack of remorse by Dr. Griswold was in response to the inartfully framed question by defense counsel on cross examination which elicited the response, "No opinion, except that I would doubt it very much." Justice Clark then stated, "If defense counsel failed to exercise such care in cross examining the psychiatrist, defendant may not now be heard to complain of the lapse." (Slip Opinion, pages 37-38).

This hypertechnical, sophistic reasoning cannot be endorsed by this court where the issue which the jury is weighing is whether the accused should live or die. The ultimate focus of the reviewing court's inquiry should not be the particular form of words being used, but rather, the message received by jurors of ordinary intelligence. That message in either case is the same, -- the defendant is lying to you when he says he feels remorse and, therefore, deserves to die.

Moreover, the introduction of psychiatric testimony on the issue of the defendant's credibility, especially in the penalty phase of a capital trial, has serious implications with respect to a criminal defendant's Sixth Amendment right to trial by an impartial jury, as well as his Fourteenth Amendment

right to due process of law. The California courts, recognizing these implications, have held that generally, psychiatric testimony for the purpose of impeachment is inadmissible (See e.g., People v. McIntyre, 256 Cal.App.2d 894 (1964); People v. Bell, 138 Cal.App.2d 12 (19); See also, Juviler, Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach (1960) 48 Cal.L.Rev. 648, 660-661).

In People v. Russel, 69 Cal.2d 187 (1968), the California Supreme Court noted some of the dangers inherent in the wholesale admission of psychiatric testimony concerning the credibility of a witness:

> A psychiatrist's testimony on the credibility of a witness may involve many dangers: The psychiatrist's testimony may not be relevant; the techniques used and theories advanced may not be generally accepted; the psychiatrist may not be in any better position to evaluate credibility than the juror; difficulties may arise in communication between the psychiatrist and the jury; too much reliance may be placed upon the testimony of the psychiatrist; partison psychiatrists may cloud rather than clarify issues; the testimony may be distracting, time consuming and costly. People v. Russel, supra, at .

The issue of the propriety of the introduction of psychiatric testimony to establish future dangerousness or propensity to commit future violent crimes in the penalty phase of a capital trial is now before this court in Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979), cert. granted, 445 U.S. 926. In that case, the United States Court of Appeals for the Fifth Circuit reviewed the grant of a federal habeas corpus petition filed on behalf of a Texas State prisoner facing the death penalty. At the penalty phase of the trial, the prosecutor, without notice to defense counsel, called to the witness stand a psychiatrist to testify concerning whether or not the defendant was prone to commit acts of violence. In that case, the psyciatrist, Dr. Grigson, labelled the defendant a sociopath as

did Dr. Griswold in the instant case. Among the questions put to Dr. Grigson by the prosecution was one concerning the defendant's lack of remorse. Dr. Grigson testified that the defendant had no remorse. Smith v. Estelle, supra, at 698.

Although Dr. Griswold was more careful than Dr. Grigson, the message he transmitted to the jury was the same: This man deserves to die. While Dr. Griswold used a two-step process, first labelling petitioner as a "sociopath", and then describing the manifestations of a sociopathic personality including lack of remorse and manipulative tendencies, the message received by the jury was no different from that delivered by Dr. Grigson.

While the opinion of the Fifth Circuit in affirming the action of the district court in granting the writ of habeas corpous did not deal specifically with the propriety of psychiatric testimony concerning the questions of remorse, but rather based its affirmance of the district court's actions on the lack of notice to defense counsel, as well as the inadmissibility of psychiatric testimony concerning predictions of future violence, the defendant in that case did not claim that he had deliberately killed but felt remorse for having done so. Rather, he claimed that the death of the storekeeper with which he was charged was not intentional.

It is now settled in captial cases "the sentencing process as well as the trial itself, must satisfy the requirements of the due process clause." Gardner v. Florida, 430 U. S. 349, 358 (1977) (Plurality opinion). See also, Green v. Georgia, 442 U.S. 95, 97 (1979); Presnell v. Georgia, 439 U.S. 14, 16 (1978). It is equally well-established that the difference between the death penalty and all other criminal sanctions "calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (Plurality opinion). Permitting the introduction of testimony of the sort introduced in the instant case allows the prosecution

to substitute the judgment of a psychiatrist for that of the jury, thereby allowing the psychiatrist and not the jury to "express the conscience of the community . . . ." Witherspoon v. Illinois, 391 U.S. 510, 519 (1968). This court cannot contenance the employment of this device to deny a criminal defendant his Fourteenth Amendment right to due process of law as well as his Sixth Amendment right to an impartial jury.

III

CALIFORNIA'S 1977 CAPTIAL PUNISHMENT LAW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

California's 1977 capital punishment law under which petitioner was sentenced to die[1/] violates the constitutional prohibition against cruel and unusal punishment because it fails to establish adquate guidelines necessary to prevent the jury (which is the sentencing authority) from imposing an arbitrary and capricious sentence of death.

In passing upon the constitutionality of capital schemes in Georgia, Florida and Texas[2/] the Court to various safeguards contained within the statutory schemes examined in those states and concluded because of those safeguards that the death penalty could constitutionally be imposed because those statutes furnished rationality and consistency by providing guidance to the sentencing authority. Although this court has not had occasion to define with specificity what the constitutionally minimum standards are for enacting a valid death penalty, California's 1977 death penalty legislation contains none of the safeguards preventing the "wanton and freakish" imposition of the ultimate penalty condemned in Furman v. Georgia, 408 U.S. 238, 309-310 (1972) (Stewart J., concurring). While no single device alone may insure the requisite rational con-

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1. See California Penal Code Sections 190.2 and 190.3 set out in statutory provisions, supra.

2. See, Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

sistency to meet constitutional standards, the lessons of Gregg v. Georgia, supra, Proffitt v. Florida, supra, and Jurek v. Texas, supra, make clear the needs for

(1) Objective, unambiguous standards to guide and to channel the sentencing authorities discretion (Gregg v. Georgia, supra, at 194-195; Proffitt v. Florida, supra, at 251; Jurek v. Texas, supra, at 273-274);

(2) A requirement that the sentencing authority explain in writing the basis upon which it decided to impose the penalty (Gregg v. Georgia, supra, at 195; Proffitt v. Florida, supra, at 250; Jurek v. Texas, supra, at 269);

(3) Instructions to the sentencing authority in the nature of a specific burden of proof or other device to guide it concerning the manner it is to weigh aggravating and mitigating circumstances (Gregg v. Georgia, supra, at 166, fn. 9; Proffitt v. Florida, supra, at 250; Jurek v. Texas, supra, at 269); and

(4) A mechanism to review aberrant death sentences in order to insure that the penalty of death is proportionately applied. (Gregg v. Georgia, supra, at 205; Proffitt v. Florida, supra, at 251; Jurek v. Texas, supra, at 276).

Each of these devices in one way or the other helps protect against arbitrary decisions in given cases and serves to winnow out the aberrant decision, thereby assuring uniformity and consistency in the application of the death penalty. Thus, an assessment of the impact of each of these devices is essential to the determination of whether California's 1977

death penalty legislation passes constitutional muster by providing alternative assurances that the sentencing authority will be properly guided.

1. Objective criteria guide and focus the jury's decision so that it will rest on penalogically appropriate principles. Pre-Furman capital statutes were defective because the absence of such guidelines left to the individual whim of each jury in its own untrammelled unreviewable discretion the task of who shall live and who shall die. Under such circumstances decisions could be made for wholly arbitrary reasons without anyone knowing it. Consistency of results could not be expected since the jury was not at any point told the basis upon which it was to make its decision.

2. A requirement that the sentencing authority indicate in writing the basis on which it decides to impose the death penalty advances the aim that the decision will be predicated on a rational ground, and beyond that if the decision is irrational it can be uncovered and corrected.

3. A specified burden of proof insures that the jury will be guided in its decision and also helps to assure that consistent results will be reached in similar cases. Without an articulated burden of proof twelve individual jurors could decide on the basis of twelve different standards whether the death penalty is appropriate. The existence of a burden of proof as a means by which to insure that two juries facing an identical set of facts may reach the same results. Without a burden there is a danger that one jury, deeming its responsibility to give the defendant the benefit of the doubt before ordering his execution, will impose a sentence of life, while another jury, on identical facts, not considering itself so limited, will impose the death penalty.

4. Proportionality review of disparate sentences is the ultimate corrective. It guarantees that the penalty

will not be irrationally imposed within a case, and conversely, that it will be imposed consistently between cases.

Viewed in the light of these concerns, California's 1977 death penalty legislation does not contain any equivalent assurances of "rationality" and "consistency" in the imposition of capital punishment:

1. Though section 190.3 directs that the jury take into account what is termed "aggravating" and "mitigating" circumstances, the jury is never advised which factors outlined in the statutes fall into one category or another. Rather, these factors are described in essentially neutral language which, like a Rorschach test, permits each juror to subjectively define the factors as he or she wishes in choosing life or death. While such neutrality in itself may not be constitutionally deficient if other procedural safeguards exist to check the exercise of juror discretion (See, Gregg v. Georgia, supra; Proffitt v. Florida, supra.), the absence in the 1977 legislation of such procedural devices leads only to caprious and random death decisions.

Section 190.3 concludes by directing that the trier of fact shall consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in this section; in determining whether the penalty shall be death or life imprisonment without the possibility of parole. However, while the section seems to provide guidance to the jury in the selection of penalty, in reality, no protection against arbitrariness in the decision making process exists because of the section's virtually limitless authorization to the trier of fact to consider "any matter relevant to. . .but not limited to. . . the circumstances of the offense and the individual characteristics and background of the defendant (California Penal Code section 190.3 (1977); Emphasis added.) The unbridled discretion which inhers in this broad statutory language encourages arbitrary and random death decisions. The statute's failure to provide other procedural devises, such as those required by the law of Texas, Florida, and Georgia, converts this danger into a certain reality.

2. The statute's failure to require the sentencing authority to furnish a written statement of the basis upon which the death penalty was imposed invites arbitrary decision-making and prevents meaningful appellate review. Although the lead opinion of the California Supreme Court in People v. Frierson, 25 Cal.3d 142, (1979), concluded in dictum that the failure of the 1977 legislation to require jurors to specify their reasons for imposing death did not violate the requirement of Gregg, supra, and Proffitt, supra, The fact remains that California procedure lacks this vital protective safeguard which makes the jury, as the sentencing authority, accountable for its death decision. Regardless of whether the absence of the requirement of reasons on the part of the sentencing authority, by itself, renders the statute constitutionally infirm. The statutory omission in this regard, especially when combined with the absence of (1) a reasonable doubt burden of proof, (2) objective, clear standards to channel sentencing discretion, and (3) a mechanism to insure true porportionality review, is critical. Without a specific, written finding concerning the aggravating factor or factors which underlie the death decision, it is impossible for the trial courts or for any reviewing court, to determine whether the decision is rational and to correct an aberrant decision.

3. The statutes failure to provide instructional guidance to the sentencing authority concerning the nature of a specific burden of proof, or the manner in which the authority is to weigh aggravating and mitigating circumstances, constitutes an invitation to jury capriciousness. The absence of specific direction concerning burden of proof clearly invites inconsistent and arbitrary penalty decisions. Considering this defect together with the other grave statutory deficiences contained within the statute, there exists no assurance under the 1977 legislation of rational consistency in penalty determination.

By contrast, both the Georgia and Texas statutory schemes examined in Gregg, supra, and Jurek, supra, require the sentencing authority to find beyond a reasonable doubt the existence of aggravating factors. Under the Florida scheme examined in Proffitt, supra, where the advisory jury recommends life, the judge must, in order to sustain the sentence of death, find the supporting facts to be so clear and convincing that virtually no reasonable person could differ. (Proffitt v. Florida, supra, at 249). Thus, in this circumstance, the judge cannot impose a death sentence without conforming his decision to this high burden of proof, thereby providing the alternative assurance set forth specifically in the Georgia and Texas legislation.

Moreover, the Florida jury's advisory function provides an additional safeguard against arbitrary decision making on the part of the sentencing authority, the factor absent under California procedure inasmuch as the sentencing authority in California (the jury) need not state in writing the reasons underlying its death decision.

California's 1977 death penalty legislation fails to provide any assurance that two juries faced with identical facts will reach the same results. Not only is there no requirement that an aggravating factor be found to exist beyond a reasonable doubt, California's 1977 legislation does not even require that the aggravating factors be found to outweigh the mitigating factors before the death penalty is imposed. (See, Proffitt v. Florida, supra, at 250). The only guidance which the sentencing authority is provided in California in its determination of penalty is one list containing a mix of aggravating and mitigating factors. The sentencing authority is not told whether a factor is aggravating or mitigating, nor instructed how to weigh the factors in combination. Penal Code section 190.3(j) simply states that:

> "After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be deaht or life imprisonment without the possibility of parole."

4. The 1977 legislation's failure to provide for meaningful and effective portionality review invites the arbitrary and discriminatory imposition of the death penalty. In an attempt to remedy this glaring defect in the statutory scheme under which petitioner was convicted and senteced to death, the California Supreme Court in People v. Frierson, supra, stated: "We stand fully prepared to afford whatever kind of proportionality review may be held constitutionally mandated by the high court." 28 Cal.3d at 317. This statement in the plurality opinion in Frierson, supra, does not commit the Supreme Court of California to engage in any kind of portionality review. Nor is the review described in the lead opinion constitutionally adequate to insure that the death penalty in a particular case is imposed in a consistent and rational manner.

What the lead opinions in Jurek, supra, Proffitt, supra, and Gregg, supra, contemplate is a prompt judicial review of the sentencing decision to insure that the death sentence in a particular case is consistent with other sentences imposed under similar circumstances. (see, Proffitt, supra, at 251, 253; Gregg, supra, at 204-206; cf Woodson v. North Carolina, 428 U.S. 280, 303, fn. 38.) True proportionality review does not contemplate alone an inquiry into the sufficiency of the evidence to support a death sentence, which the Frierson plurality appears to consider an adequate protection against disproportionate punishment. Rather, what is required to insure rational consistency is a mechanism by which the court may collect data concerning all cases in which the death penalty could have been or was actually imposed, and concerning the

background and characteristics of the individual defendant in those cases so that the court may make a meaningful case by case comparison.

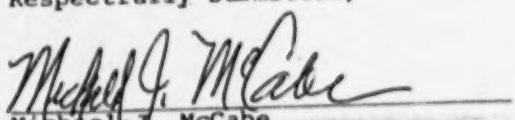
Clearly, without some method of collecting such data regarding all potential and actual capital cases, and without assurances that these cases will be considered in the comparison of death cases generally -- a matter on which the plurality opinion in Frierson is silent -- effective review of sentences to insure rational consistency is not possible.

CONCLUSION

For the foregoing reasons, the petitioner respectfully urges this court to issue a writ of certiorari to review the judgment of the California Supreme Court in this case.

Dated: May 18, 1981

Respectfully submitted,



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PEOPLE v. HARRIS

Crim. 20888

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EXHIBIT 'A'

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ALTON HARRIS, Defendant and Appellant.	Crim. 20888 Super. Ct. No. 44135

Defendant Robert Alton Harris appeals from a judgment imposing the death penalty following his conviction of kidnaping, robbery and first degree murder of John Mayeski and Michael Baker. (Pen. Code, §§ 187, 189, 190, 209, subd. (b), 211.)[1/] Defendant was also convicted of receiving stolen property (§ 496, subd. 1) and of possession of a concealable firearm by an ex-felon (§ 12021). The latter offense and the allegation that he had served a prior separate prison term for manslaughter, a "violent felony" within the meaning of section 667.5, subdivision (c), were admitted by defendant outside the presence of the jury. With regard to each of the kidnaping, robbery and murder

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1/ Statutory references are to sections of the Penal Code unless otherwise noted.

(SEE CONCURRING AND DISSENTING OPINIONS)

counts, the jury found defendant was armed with a firearm (§ 12022), personally used a firearm (§§ 1203.06, 12022.5) and personally inflicted great bodily injury upon his victims (§ 12022.7). That defendant was convicted in this proceeding of more than one first degree murder was one of the special circumstances found by the jury. (§ 190.2, subd. (c)(5).) The other special circumstances were that each of the murders was willful, deliberate, premeditated and committed during the commission of kidnaping and robbery. (§ 190.2, subd. (c)(3)(i)-(iii).) We affirm the judgment.

GUILT PHASE

In May or June of 1978 defendant first asked his brother Daniel for help in a planned bank robbery.[2/] Defendant next raised the subject in July of 1978 while visiting Daniel in Visalia. On 2 July 1978, Daniel stole a .22 rifle and a .9 millimeter pistol from the home of Jim Corbin, a neighbor. While Daniel and defendant were in the house, apparently in Corbin's absence, defendant stated they needed weapons for the bank robbery and asked whether there were any in the house. Daniel then showed defendant the guns and took them from the house.

2/ Daniel testified for the People in return for being permitted to plead guilty to one count of kidnaping. His testimony was corroborated by a series of extrajudicial statements made by defendant.

The brothers left Visalia for San Diego that evening. The next morning, 3 July 1978, they purchased ammunition, went to a nearby rural area and practiced firing the weapons by shooting at trees while running and rolling--a drill they considered appropriate in preparing for the bank robbery. The brothers then drove to the Mira Mesa area of San Diego County and spent the night in a house defendant had been sharing with his girl friend.

The following morning, 4 July 1978, defendant and his brother purchased more ammunition as well as knit caps, in which they burned eye holes, to serve as masks in the bank robbery. That afternoon they went to the Miramar Lake area, near Mira Mesa, for more shooting practice. They walked up a fire trail, fired a few rounds, but left when a vehicle approached. They next reconnoitered the area around their intended target--the San Diego Trust and Savings Bank on Mira Mesa Boulevard.

The next morning, 5 July 1978, having decided to steal an automobile for use as a getaway car, the brothers spotted a green Ford in a grocery store parking lot directly across Mira Mesa Boulevard from the bank. John Mayeski, 15, and Michael Baker, 16, were in the car eating hamburgers. Assuring Daniel "nobody is going to get hurt," defendant walked over to the Ford, pulled the pistol from his waistband,

and got in the back seat. With Daniel following in defendant's car, the Ford was then driven out Mira Mesa Boulevard toward Miramar Lake and the fire trail where the brothers had been the day before.

At the foot of the fire trail defendant and Daniel parked the cars and forced the two boys to walk up the trail at gunpoint. Defendant was carrying the pistol and Daniel the rifle. Defendant told the boys their car was going to be used in a bank robbery but that no one would be hurt. Defendant asked the boys whether there was any rope in their car. The boys replied there was not but said they would walk to the top of the hill, wait until the brothers drove back to Mira Mesa, and then report the Ford as stolen, giving the police a misleading description of the thieves. Defendant voiced approval of this suggestion.

The boys then began walking up the hill. Suddenly, Daniel heard a shot. Turning around, he saw John Mayeski fall to the ground. Defendant had shot the boy in the back with the pistol. Defendant fired another shot into the boy's head, then ran after Michael Baker. Finding the Baker boy crouching and screaming in the brush, defendant shot him four times. Defendant then went back to the fallen Mayeski boy and fired a shot point-blank into his head. Finally, defendant picked up the rifle dropped by

Daniel and shot John Mayeski yet again. The brothers then left the murder scene and drove back to the house defendant shared in Mira Mesa. There defendant ate the remainder of the dead boys' food and laughed at Daniel for not having the stomach to join him.

While the brothers continued preparing for the bank robbery, defendant laughed and giggled about shooting the boys, saying he had blown Michael Baker's arm off. Defendant also amused himself by imagining what it would be like to be a police officer and to report the boys' deaths to their families. When Daniel noted there were fragments of flesh on defendant's pistol, apparently from the point-blank shot fired into John Mayeski's head, defendant laughed, commented he had really blown the boy's brains out, and then flicked the bits of flesh into the street.

Later the same day the brothers robbed the bank.[3/] They were quickly arrested for the bank robbery when a witness, who followed them from the bank to defendant's house, called the police.

3/ They were convicted of this crime in a federal proceeding.

The brothers were arrested at 1:05 p.m. on 5 July 1978. At 4 p.m., Daniel first informed officers of the murders; at 6:30 p.m., Daniel confessed in a tape-recorded statement, placing the blame primarily on defendant. At 7 p.m., having listened to portions of Daniel's statement, defendant himself confessed to Officer Fred Dreis. At midnight, the brothers were interviewed by Dr. Wait Griswold, a psychiatrist. On 7 July 1978, at 11:20 a.m., defendant repeated his confession in detail to Johnny Bolden, a criminal investigator for the San Diego County District Attorney's office. Finally, at 1 p.m. on 7 July 1978--an hour before he was arraigned--defendant confessed to Officer Ronald Newman. 4/

When one of defendant's sisters visited him in jail on 15 July 1978, he told her, "Now, I guess because I killed those two boys, they were only 16 years old, then robbed the bank and kidnaped them was because I really wanted to die." Defendant's last extrajudicial confession was made to a fellow inmate. Asked why he had killed the boys, defendant answered, "I couldn't have no punks running around that could do that [identify him], so I wasted them."

4/ The details of defendant's confessions will be given when we discuss his contention that the last of the four confessions, the one to Officer Newman, should have been suppressed on the ground his arraignment was unnecessarily delayed.

Testifying in his own behalf at the guilt phase, defendant admitted the bank robbery but denied kidnaping, robbing and murdering the two boys. He explained his pretrial confessions as attempts to protect his brother.

PENALTY PHASE

In 1975 defendant pleaded guilty to voluntary manslaughter of James Wheeler.

Wheeler and his wife lived with defendant's brother Ken and his wife; defendant and his wife lived next door. At the scene, defendant admitted beating Wheeler to death but claimed he had done so to protect the victim's wife when her husband threatened her with a knife. Later, just as in the present case, defendant repudiated his confession and sought to shift the blame to his brother, claiming Ken had killed Wheeler and that he had confessed to protect Ken. This is the story defendant told when testifying in the present proceeding. However, defendant's former wife and his niece testified defendant, without provocation, beat Wheeler to death while mockingly claiming to teach his victim self defense. During this sadistic attack defendant also cut off Wheeler's hair and threw matches at him after squirting him with lighter fluid. Defendant's former wife admitted she lied to the

grand jury investigating Wheeler's death explaining defendant had threatened to kill her too if she did not support his story.

Defendant continued to lead a life of violence while in jail awaiting trial on the present charges.

Defendant was housed in a "tank" consisting of a dayroom and adjoining cells. A guard approaching the tank overheard a conversation between defendant and other inmates in which reference was made to a knife. When the guard left to advise his superior a search should be conducted, one of the inmates, realizing a search was likely, told defendant to hide the "shank."[5/] Defendant went to his cell, removed from a box a piece of metal, which was approximately 10 inches long and sharpened on 1 edge. He then returned to the dayroom and concealed the shank underneath a table top where guards found it minutes later.

The next day defendant presided over a kangaroo court and found another inmate, Keith G., guilty of cowardice. Defendant told Keith he would have to submit to sodomy or lose his life. Keith was then taken into a cell, forced to

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5/ A "shank" is a knifelike implement fashioned by a prisoner from available materials.

lie face down on the bunk with his trousers pulled down and forcibly subjected to sodomy by three inmates, including defendant. Later in the day his assailants demanded Keith play strip poker with them. When Keith would not pick up his cards he was taken into the shower room and forced to orally copulate defendant and another inmate. Removed from the tank when he reported the assaults, Keith later encountered defendant in a holding area. Despite the presence of guards, defendant loudly and repeatedly threatened Keith's life.

Six days after the assaults upon Keith were reported, defendant's cell was searched. In the toilet a large water-soaked wad of tissue was found. Wrapped in the tissue was a 17-inch wire with looped ends in which the short pencils available to inmates might be inserted as handles. The guard who found this garrote said, "Look what I found, Bobby." Defendant, laughing, replied, "Aw, looks like you have me now."

Defendant's testimony during the penalty phase indicated he had a dismal childhood. When defendant was approximately 11 years old, his father served two separate prison terms for having sexual relations with defendant's sisters. The family then followed the harvest from state to state with defendant's mother and her boyfriend.

Defendant's schooling ended in the seventh grade. Defendant's mother forced him to leave the family when he was 14, saying he was not working hard enough. He soon stole a car and served four years in federal institutions for that crime, escape and a separate instance of attempted escape. He was subsequently imprisoned for the voluntary manslaughter of James Wheeler. Defendant was 26 years old at the time of trial.

Defendant admitted his testimony at the guilt phase--that he had nothing to do with killing the boys--was a lie. Changing his story, defendant testified he had not planned to kill the boys, that his brother had fired first, and "the next thing I knew I was shooting them myself."

Defendant claimed he was "sorry" about the murders. In support of this claim, defendant called Deputy Sheriff Michael Mendoza who testified that when he inquired into defendant's emotional state after he cut his wrist and reportedly attempted to stab himself with a pencil, defendant appeared remorseful. However, defendant admitted on cross-examination he had told a jail visitor his attorney wanted him to express remorse and he was not going to do so.

DISCUSSION

None of the many contentions raised by defendant has merit. Indeed, none comes close to demonstrating prejudicial error. Nevertheless, because defendant's life is at stake, each will be fully discussed.

I

Defendant contends the trial court erred in denying his motion for change of venue based on prejudicial pretrial publicity.

A change of venue must be granted when the defendant shows a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. (People v. Welch (1972) 8 Cal.3d 106, 113; Frazier v. Superior Court (1971) 5 Cal.3d 287, 294; Maine v. Superior Court (1968) 68 Cal.2d 375, 383.) Whether raised on petition for writ of mandate or on appeal from judgment of conviction, the reviewing court must independently examine the record and determine de novo whether a fair trial is or was obtainable. (People v. Welch, supra; People v. Tidwell (1970) 3 Cal.3d 62, 68-69; Maine v. Superior Court, supra, 68 Cal.2d at p. 382.) The factors to be considered are the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status

of the defendant in the community, and the popularity and prominence of the victim. (People v. Salas (1972) 7 Cal.3d 812, 818.)

Of these factors, two weighed in favor of a change of venue in this case. Murder is, of course, a crime of the utmost gravity, and these murders were especially heinous. Press coverage of the crimes was extensive and included such information as that defendant was on parole for manslaughter, that his brother had confessed and had placed the blame principally on defendant, and that defendant himself had confessed. Two factors were neutral. Although the murdered boys were popular among their friends and their families were respected in their neighborhood, there is no indication the victims or their families were "prominent." (Cf. Maine v. Superior Court, supra, 68 Cal.2d at p. 388; Frazier v. Superior Court, supra, 5 Cal.3d at p. 293.) Defendant lived in the same community as his victims and worked in San Diego. The final factor--the size of the community--tipped the balance against venue change.

The community in which this case was tried is quite unlike the communities involved in the cases upon which defendant relies. Of the fifty-eight California counties, San Diego County is third in population and

ninth in area. Moreover, the City of San Diego, where the trial took place, is the second largest city in this state. (State of Cal. Statistical Abstract (1979) pp. 1, 9, 12-15.) This is significant because the "adversities of publicity are considerably offset if trial is conducted in a populous metropolitan area." (People v. Manson (1976) 61 Cal.App.3d 102, 189, and cases cited therein.) That the populous metropolitan character of the community dissipated the impact of pretrial publicity in this case was made clear on voir dire.

"A significant difference between pretrial and posttrial review is that after conviction in determining whether a defendant received a fair and impartial trial under the 'reasonable likelihood' standard, the review is retrospective. It extends to an examination of what actually occurred at trial." (People v. Martinez (1978) 82 Cal.App.3d 1, 13.) In other words, voir dire may demonstrate that pretrial publicity had no prejudicial effect. (See Murphy v. Florida (1975) 421 U.S. 794, 800-802; People v. Sommerhalder (1973) 9 Cal.3d 290, 303-304; People v. Manson, supra, 61 Cal.App.3d at pp. 187-188; People v. Whalen (1973) 33 Cal.App.3d 710, 716.)

Before discussing the voir dire in this case, it should be emphasized that the controlling cases

"cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." (Murphy v. Florida, supra, 421 U.S. at p. 799.) "It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion of the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." (Irvin v. Dowd (1961) 366 U.S. 717, 722-723.)

Examined under these guidelines, the voir dire clearly indicated pretrial publicity did not have the effect of denying defendant his right to a fair and

impartial jury. Four of the jurors chosen had not been exposed to any pretrial publicity. Of the remainder, none remembered anything in the least damaging to defendant, none knew anything about his background, and none had formed an opinion concerning his guilt or innocence.

II

We now consider defendant's contention that the trial court erred in denying his mistrial motions. The two motions arose out of separate but related incidents. The first incident involved a transcript given to the jury to assist them in understanding a tape recording of one of defendant's extrajudicial statements. Defendant moved for a mistrial on the ground the transcript contained a reference to his having called his parole officer. The second mistrial motion was based on the prosecutor's having elicited from defendant during cross-examination the admission he had been convicted of a felony and was on parole. Neither motion proves to have had merit.

A

As stated, because of acoustical problems members of the jury were furnished transcripts of defendant's extrajudicial statement to Officer Dreis. References to defendant's manslaughter conviction

were excised from the transcripts and the corresponding portions of the tape recording were not played for the jury. Well before trial, defense counsel was given a copy of the edited transcript. After reviewing it, counsel stated he had no objection. Despite these precautions, as the tape was being played for the jury, the prosecutor noticed in the transcript the reference to defendant's having called his parole officer. Commendably, the prosecutor immediately brought the problem to the court's attention. As a result the tape was stopped before the passage in question was played, the jury was asked to stop reading the transcripts, and a recess was ordered. During the recess the transcripts were left on the jurors' chairs and collected by the bailiff. Denying the mistrial motion with the observation he did not believe the jurors had read as far as the troublesome reference, the court offered to inquire whether the jurors had read that passage. This offer was declined by defendant, but with his approval the jury was carefully instructed they were to disregard anything they may have read in the transcripts if the corresponding portion of the tape recording had not been played for them.

First, defendant should not be permitted to raise this issue, having reviewed and approved the

transcript. Second, as the trial court pointed out, there is no reason to believe the jury read the statement in question. Third, if they did read the statement, we must assume they obeyed the instruction to disregard it. Finally, as will be explained below, inquiry by defense counsel following the guilt phase revealed the jury did not consider defendant's prior conviction during its deliberations.

B

Defendant's admission during cross-examination that he had previously been convicted of a felony and was on parole occurred under the following circumstances. Shortly after defendant was arrested, an evidence technician took nitric acid swabs of his hands to check for gunpowder residue. As the technician did so, defendant asked him whether the swabs would detect powder burns and pick up gunpowder particles. Upon being informed the test would reveal whether he had fired a gun recently, defendant stated he had been shooting in the Porterville area approximately 24 hours earlier. Defendant contradicted this statement at trial when he testified he had been in the San Diego area the day before the murders and had fired a gun near Miramar Lake. Defendant further testified he had not known of the murders, or of any shootings,

when the nitric acid swabs were taken, but was simply curious as to the purpose of the test.

The prosecutor pursued this line of inquiry further to demonstrate that in his conversation with the technician defendant manifested a consciousness of guilt--that defendant was concerned about the test because he knew he had gunpowder on his hands as a result of shooting the boys and that defendant lied to the technician about his activities the previous day to provide an alternative, innocent explanation for the powder traces. Defendant clearly realized he was being backed into a corner; rather than admit the truth, he blurted out that he was an ex-felon and on parole.[6/]

6/ "Q. Well, why would you be concerned about gunpowder being on your hand at that time, then?
"A. Just curious.
"Q. You didn't know there had been a killing of two boys up to that time, did you?
"A. No.
"Q. Didn't know anything about a gun prior to that, did you?
"A. No.
"Q. But you asked Mr. Stewart if this swabbing would take gunpowder off your hand, didn't you?
"A. Yes.
". . . . . .
"Q. Weren't you concerned that he would find evidence of your firing a gun that day when you killed the two boys?
"A. No.
"Q. It didn't bother you at all?
"A. Bother me? No, not then, no.
"Q. You weren't worried about there being evidence on your hands of firing a gun; right?
"A. Yes and no.

(Fn. 6 continued.)

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innocence or guilt of the crimes charged in this proceeding.

"Where a defendant takes the stand and makes a general denial of the crime the permissible scope of cross-examination is very wide." (People v. Ing (1967) 65 Cal.2d 603, 611, and cases cited therein.) When a defendant voluntarily testifies in his own defense the People may "fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross-examination which explains or refutes his statements or the inferences which may necessarily be drawn from them." (People v. Schader (1969) 71 Cal.2d 761, 770.) Evidence relevant for these purposes is admissible even though it incidentally involves an unrelated offense. (People v. Crawford (1968) 259 Cal.App.2d 874, 880.)

Under these principles the prosecutor's cross-examination of defendant was entirely proper. Moreover, any error in this regard was cured by the instruction that the jury was not to consider defendant's admission in determining whether he committed the present offenses. That the jury followed this instruction was established by inquiry defense counsel was permitted to make of the jury following the guilt phase. At the hearing on

defendant's motion for new trial, defense counsel was asked by the court whether his inquiry of the jurors had shed any light on the issue. Counsel responded that none of the jurors he had interviewed was aware of defendant's prior conviction or had discussed the subject during deliberations.[7/]

III

Defendant contends the trial court erred in denying his motion to suppress his confession to Officer Newman. Defendant had argued in support of the motion that his arraignment was unnecessarily delayed and that the challenged confession was obtained during the period of illegal detention. We need not resolve the question whether defendant was promptly arraigned. Even assuming arguendo he was not promptly arraigned, the delay would not necessarily have rendered his confession to Officer Newman inadmissible. "[D]elay in arraignment is but one factor to be considered in determining whether a confession is voluntary." (In re Walker (1974) 10 Cal.3d 764, 778-779; see People v. Kendrick (1961) 56 Cal.2d 71, 85; Rogers v. Superior Court (1955) 46 Cal.2d 3, 10-11.) It is not

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7/ The contention raised in a supplemental brief --that trial counsel violated his obligations to defendant by telling the court what the jurors told him--is as offensive as it is absurd.

contended, nor could it be, that defendant's confession to Officer Newman was involuntary.

Defendant was arraigned on the present charges 48 hours and 55 minutes after he was arrested for the bank robbery. The challenged confession was the last of four made by defendant during this period and occurred approximately an hour before he was arraigned. The parties stipulated to the following chronology. Defendant and his brother Daniel were arrested for the bank robbery and taken to the police station for interrogation concerning that crime at 1:05 p.m. on 5 July 1978. At 4 p.m., Daniel first informed the officers of the murders; 10 minutes later the victims' bodies were found at the location described by Daniel. At 6:30 p.m., Daniel confessed in a tape-recorded statement, placing the blame primarily on defendant.

At 7 p.m., having listened to portions of Daniel's statement, defendant confessed to Officer Dreis. (It is not contended with regard to any of these confessions that defendant's rights under Miranda v. Arizona (1966) 384 U.S. 436 were violated.) Defendant told Officer Dreis: "Danny thought I was going to let them go. He didn't know I was going to kill them. Danny was about 20 feet away sitting down when I shot them. I shot one and he spun around. I then

shot him in the head because I didn't want him to suffer. I chased the other and shot the other boy about three times. Danny was scared and he didn't shoot either of them. I think I took the .22 and shot the blond kid one time. I was pretty loaded and didn't know what I was doing. I had smoked two joints before this came down. My brother was terrified. I didn't know what I was doing."

At midnight defendant and his brother were transported to the office of Dr. Wait Griswold, a psychiatrist, and interviewed by him concerning the murders. Defendant told Dr. Griswold he had shot the victims after assuring his brother they would not be hurt.

Defendant and his brother were booked into jail in the early morning hours of 6 July 1978. On 7 July 1978, at 11:20 a.m., defendant repeated his confession in detail to Investigator Bolden. He told Bolden, among other things, that he and his brother planned to steal an automobile for use as a getaway car in the bank robbery; that he had approached the victims' car, pulled his pistol out of his waistband, entered the back seat of the car and ordered the boys to drive away; and that he shot John Mayeski in the chest and

head with the pistol, then chased Michael Baker and upon catching him, shot the boy three or four times with the pistol, and, finally, went back to Mayeski and shot him with the rifle.

The challenged confession was given to Officer Newman at 1 p.m. on 7 July 1978--an hour before defendant was arraigned. Defendant contends this confession was crucial to the People's case, despite its being the last of the four confessions. He argues its detailed character was used by the People to impeach defendant's testimony at trial that he had no part in kidnaping, robbing and murdering the two boys; that his brother was solely responsible for the crimes; that his confessions were attempts to cover up for his brother, and that he learned the details of the crimes from his brother while they were detained at the police station. Be that as it may, it is clear the delay in his arraignment did not affect the voluntariness of defendant's confession to Officer Newman. There is no reason to believe that confession was less voluntary than his previous confessions, the first of which was given 42 hours earlier, just 6 hours after his arrest.

IV

Defendant contends he was deprived of his

constitutional and statutory right to be present personally at all trial proceedings. (See Cal. Const., art. I, § 15; Pen. Code, §§ 977, 1043.) As the People's case-in-chief drew to a conclusion, a hearing was held in the absence of the jury as to the admissibility of the People's exhibits theretofore marked for identification. There was also a brief review of the question whether the jurors should have been polled by the court as to whether they had read defendant's reference to his parole status in the transcript of his interview with Officer Dreis. The record clearly indicates defendant was not present at this hearing; it also reveals, with equal clarity, his counsel did not object to his absence. Given the nature of the matters under discussion, defendant's presence was not necessary to protect his interests. Accordingly, the court did not err in holding the hearing in defendant's absence. (See People v. Jackson (1980) 28 Cal.3d 264, 309-311.)

V

Defendant contends the trial court erred in instructing the jury by failing to properly limit the purposes for which other-crimes evidence might be considered.

Tailoring CALJIC No. 2.50 (1977 revision) to the facts of this case, the court instructed the jury: "Evidence has been received tending to show that the defendant committed a crime other than that for which he is on trial. Such evidence was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show one or more of the following: The identity of the person who committed the crime, if any, of which the defendant is accused; a motive for the commission of the crime charged; the existence of the intent which is a necessary element of the crime charged; that the defendant had knowledge of the nature of things found in his possession; that the defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged. For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. You are not permitted to consider such evidence for any other purposes."

Defendant expressly concedes the instruction was correct insofar as it related to motive; that is, defendant concedes the evidence he subsequently robbed the bank using the murder victims' automobile as a getaway car was admissible as tending to show his motive in committing the murders. However, defendant contends the instruction was erroneous insofar as it permitted evidence of the uncharged crime to be considered for the other purposes mentioned.

Before discussing those other purposes, we note there is no merit in the People's argument that defendant is precluded from raising this issue by his failure to object to the instruction below. Section 1259 provides in relevant part: "The appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (Italics added; see People v. Hannon (1977) 19 Cal.3d 588, 600.)

However, there is merit to the People's argument that evidence of the uncharged offense was admissible on the questions of identity, means and intent. That defendant later the same day robbed a

bank with the pistol used to murder the boys, driving as a getaway car the automobile stolen from the boys, certainly tended to show both that he had the means necessary to commit the murders and that he did in fact commit the murders. The evidence was also admissible on the question of intent, indicating as it did that the murders were committed in furtherance of the planned bank robbery.

The relevance of the bank robbery on the remaining issue--"that the defendant had knowledge of the nature of things found in his possession"--is unclear. However, despite the reference in the instruction to "a crime," evidence was introduced concerning another uncharged offense--the burglary of Jim Corbin's residence and the theft of his guns. These guns were the stolen property defendant was charged with receiving, and his participation in the theft of the guns clearly tended to show he knew they were stolen.

VI

Defendant contends the trial court erred in refusing to give requested instructions on diminished capacity resulting from voluntary intoxication.

The principles governing the duty of the trial court to instruct on diminished capacity were

reiterated recently in People v. Flannel (1979) 25 Cal.3d 668. "In substance when diminished capacity is at issue a trial court first evaluates the evidence. If defendant proffers evidence enough to deserve consideration by the jury, i.e., 'evidence from which a jury composed of reasonable men could have concluded that there was diminished capacity sufficient to negate the requisite criminal intent' [citation], the court must so instruct. A trial court should not, however, measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, a task exclusively relegated to the jury. If the evidence should prove minimal and insubstantial, however, the court need not instruct on its effect. [Citations.] In other words, '[t]he court should instruct the jury on every theory of the case, but only to the extent each is supported by substantial evidence.' [Citation.]" (25 Cal.3d at pp. 684-685.)

The trial court explained its refusal to instruct on diminished capacity as follows: "I think I indicated in our informal discussion that the Court in viewing this evidence was satisfied that we did not have a basis for diminished capacity instructions. [¶] First of all, we have no expert testimony in that regard. We have direct evidence on the part of the defendant

that even the marijuana that he had admittedly smoked did not in any way interfere with his knowledge of what he was doing. He did not claim any mental blackouts; he did not claim anything that would ordinarily go to the question of mental state in terms of diminished capacity, and I see no reason for giving those instructions."

Defendant contends substantial evidence of diminished capacity was elicited by the People from Officer Dreis when he testified that, in confessing to the murders, defendant told him: "I was pretty loaded and I didn't know what I was doing. I had smoked two joints before this came down. . . . I didn't know what I was doing."

Respondent points out, however, defendant repudiated that statement at trial. "Q Now, you weren't so under the influence of marijuana on [the day of the murders] that you didn't know what you were doing, were you? A No."

Moreover, defendant's statement to Officer Dreis, even if not repudiated, would not have constituted sufficiently substantial evidence of voluntary intoxication to warrant instructions on diminished capacity. The statement amounted to nothing more than a self-serving claim that, after smoking two

"joints" of marijuana, "I didn't know what I was doing." There was no indication how soon before the murders he smoked the marijuana. Nor, as the trial judge pointed out, was there any expert testimony on the effect that amount of marijuana would have on a person such as defendant.[8/] Contributing to our conclusion that the evidence of diminished capacity was insubstantial is the testimony of defendant's brother. Danny Harris testified defendant smoked one "joint" of marijuana approximately an hour before the murders and did not appear to be significantly intoxicated. Defendant's gait and speech were normal; he could understand what was said to him and could make himself understood. Finally, defendant's several detailed confessions belie his claim he did not know what he was doing.

In People v. Carr (1972) 8 Cal.3d 287, this court noted with approval: "It has been held that merely showing that the defendant consumed some alcohol prior to commission of the crime without showing the effect of the alcohol on him is not sufficient to warrant an instruction on diminished

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8/ The importance of expert testimony for a claim of diminished capacity based on voluntary intoxication was recently emphasized in People v. Frierson (1979) 25 Cal.3d 142.

capacity." (8 Cal.3d at p. 294.) The Carr court went on to say: "Similar rules should apply to the consumption of marijuana." (Id., at p. 295.)

Bearing these rules in mind, we may profitably compare the evidence of marijuana intoxication in this case with cases in which this court has held evidence of alcohol intoxication to be too insubstantial to support instructions on diminished capacity. In People v. Flannel, supra, this court stated: "[W]e are of the opinion that defendant presented no substantial evidence of intoxication. First, defendant consumed relatively small amounts of alcohol over a long period of time. In the early morning, somewhere about 10 a.m., defendant drank about four tall cans of beer and a shot or two of gin. He then went shopping with his girl friend, and ate a sandwich for lunch. Between 2:30 and 4 that afternoon defendant drank a couple of beers and a shot of whiskey. In People v. Bandauer [1967] 66 Cal.2d 524, 528 [58 Cal.Rptr. 332, 426 P.2d 900], we found evidence of intoxication insufficient to require an instruction on diminished capacity if the defendant had 'six or seven beers during the six hours he was at various bars . . ., and he did not appear to be intoxicated.' Similarly, in People v. Spencer [(1963) 60 Cal.2d

64,] 88-89, we found evidence of intoxication 'minimal,' and therefore erroneous instructions immaterial, when defendant testified that he had had '"about three shots of whiskey" and some beer, and was "pretty well plastered."' Having observed defendant's behavior, the arresting police officers, however, testified that defendant was not under the influence of intoxicating liquor." (25 Cal.3d at p. 685.)

VII

Defendant contends the excusal of juror Susan McDevitt was error under Witherspoon v. Illinois (1968) 391 U.S. 510. Witherspoon holds that a prospective juror with scruples against the death penalty may not be excused for cause on that basis unless he makes it unmistakably clear he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at trial. (391 U.S. at p. 522, fn. 21.) That standard was clearly satisfied here.

The critical exchange occurred during voir dire by defense counsel.

"Q . . . are you saying that in no instance could you ever vote for the death penalty?

"A According to my own conscience? I would not use the death penalty, no.

"Q Are you saying you could never in any instance, if you are selected as a juror, vote for the death penalty?

"A No, never.

"Q If you were chosen as juror and the Court instructed you that it was your duty to consider both penalties, is it your testimony that you could not do so; that you would automatically and without regard to any evidence vote against the death penalty?

"A That's according to my own conscience.

"Q That is your belief?

"A Yes."

Defense counsel thereupon stated he had no further questions of Ms. McDevitt, the prosecutor challenged her for cause, and the court excused her. The exclusion was proper.

VIII

Defendant contends the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt and substantially increases the risk of conviction. This contention, voiced on appeal and amplified in a petition

for writ of habeas corpus which we earlier denied (In re Harris, Crim. 21341, denied by minute order on 22 October 1980), lacks merit. (Hovey v. Superior Court (1980) 28 Cal.3d 1.)

IX

We now consider defendant's contention that the trial court made a number of erroneous evidentiary rulings during the penalty phase.

A

Defendant contends the court erred by permitting the People to call defendant's wife in rebuttal without having given him notice as required by section 190.3.

Then, as now, section 190.3 provided in relevant part: "Except for evidence in proof of the offense or special circumstances which subject a defendant to

the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to the trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation." (Italics added.) The italicized exception is applicable here. No notice was required because the People called defendant's wife to rebut his testimony in mitigation.

B

Defendant contends psychiatrist Wait Griswold, testifying for the People in rebuttal during the penalty phase, usurped the function of the jury, "set[ting] himself up as a human lie detector concerning whether or not [defendant] felt remorse for his having killed the victims."

Defendant himself raised the question of remorse. As stated, having claimed during the guilt phase to have had nothing to do with the murders, defendant recanted that testimony during the penalty phase, expressly admitting the crimes and stating he was "sorry." He then sought to support his claim of remorse by calling Deputy Mendoza who testified

that when he inquired into defendant's emotional state after he cut his wrist and reportedly attempted to stab himself with a pencil, defendant appeared to feel remorse for his crimes.

Dr. Griswold's testimony on direct examination was entirely unobjectionable. The psychiatrist testified he had examined defendant and was of the opinion he had an "antisocial personality"--a character disorder also known as "sociopathic" or "psychopathic" personality. Dr. Griswold stated sociopaths are commonly manipulative and, drawing upon his extensive experience as a prison psychiatrist, explained that in prison this manipulative tendency might be expressed by "ingratiating themselves with prison personnel [and] by . . . making what appear to be suicidal gestures in order to call attention to themselves or to manipulate themselves out of a difficulty."

Framing his question carefully, the prosecutor did not ask Dr. Griswold whether he believed defendant when he said he was remorseful. Rather, he asked, "if a person were truly a sociopath and had committed the crimes of the type that you discussed with [defendant], would you expect that

person to truly feel remorse for those crimes?" Dr. Griswold responded, "No, I would not." It was defense counsel who asked Dr. Griswold whether he credited defendant's claim of remorse. Asked on cross-examination, "So you venture no opinion whether or not he is remorseful at this time," the psychiatrist responded, "No opinion except that I would doubt it very much." The prosecutor carefully avoided encroaching upon the jury's province when he examined Dr. Griswold on direct. If defense counsel failed to exercise such care in cross-examining the psychiatrist, defendant may not now be heard to complain of the lapse.

C

Defendant contends the court erred in refusing to admit testimony of Clinton Duffy, former warden of San Quentin, and Howard Brodie, a CBS correspondent and courtroom artist, explaining how the death penalty is carried out. Evidence presented at the penalty phase should focus on "the character and record of the individual offender and the circumstances of the particular offense." (Woodson v. North Carolina (1976) 428 U.S. 280, 304.) The proffered testimony had no bearing on those issues and thus was properly excluded.

D

Concluding this line of argument, defendant contends the court erred in admitting evidence that while in jail awaiting trial for the present offenses defendant was found in possession of a wire garrote and prison-made knife. Defendant is precluded from raising this issue on appeal by his failure to preserve the point by appropriate objection in the trial court. (Evid. Code, § 353; People v. Rogers (1978) 21 Cal.3d 542, 547-548.) Moreover, the evidence was clearly admissible under section 190.3, which in relevant part provided then, as now: "However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction." (Italics added.) Possession of the garrote and the knife clearly involved an implied threat to use force or violence.

X

Defendant contends that instructing the jury pursuant to former CALJIC No. 8.89 was error

under former section 190.4, subdivision (b), and People v. Gainer (1977) 19 Cal.3d 835.

Former CALJIC No. 8.89 provided in pertinent part: "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on defendant. After having considered all of the evidence in this case and having taken into account all the applicable factors upon which you have been instructed, you shall determine whether the penalty to be imposed on defendant shall be death or confinement in the state prison for life without the possibility of parole." (Supp. Service, pamp. No. 1 (1978).)

Former section 190.4, subdivision (b), provided in pertinent part: "If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole." (Added by Stats. 1977, ch. 316, § 12, pp. 1260-1262, and repealed by § 9 of Initiative

Measure approved Gen. Elec. 7 Nov. 1978.)[9/]

Defendant argues that instructing the jury it "shall determine" whether the penalty is to be death or life imprisonment without possibility of parole creates the false impression that there is no third alternative, namely, deadlock.

People v. Gainer, supra, is inapposite. No "dynamite" instruction of the sort condemned in Gainer was given here. This jury was never deadlocked. It was not instructed that the case "must at some time be decided." (Cf. People v. Gainer, supra, 19 Cal.3d at pp. 841, 851-852.) Nor were minority jurors admonished to reconsider their opinions in light of the fact that the majority had taken the opposite position. (Id., at pp. 841, 847-851.) Moreover, CALJIC No. 17.40, the continued use of which was commended in Gainer, was given here.[10/] No error appears.

9/ Section 190.4, subdivision (b), now provides that a new jury is to be impaneled to try the penalty issue if the original jury is unable to reach a unanimous verdict. Upon a second failure to reach unanimity, the judge has discretion to impanel a third jury or to impose a life sentence without possibility of parole. (Added by § 10 of Initiative Measure approved Gen. Elec. 7 Nov. 1978.)

10/ CALJIC No. 17.40 provides: "Both the People and the defendant are entitled to the individual

(Fn. 10 continued.)

XI

Finally, defendant contends imposition of the death penalty under the 1977 statute would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Defendant admittedly does no more than ask us to reconsider the various arguments rejected in People v. Frierson (1979) 25 Cal.3d 142, 172-188 (opn. by Richardson, J.). We decline to do so. (See People v. Jackson, supra, ___Cal. 3d ___.)

None of defendant's contentions having merit, the judgment imposing the death penalty is affirmed.

CLARK, J.

WE CONCUR:

RICHARDSON, J.
NEWMAN, J.

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opinion of each juror. It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after a discussion of the evidence and instructions with the other jurors. You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision." (4th ed. 1979.)

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C O P Y

PEOPLE v. HARRIS

Crim. 20888

CONCURRING OPINION BY TOBRINER, J

For the reasons set forth in the dissenting opinions of the Chief Justice and Justice Mosk in People v. Jackson (1980) 28 Cal.3d 264, I continue to believe that the death penalty statute under which defendant was convicted is unconstitutional. Until the majority opinion in Jackson is reversed by the United States Supreme Court or is overruled by a majority of this court, however, I consider myself bound by that decision's holding. Because I agree with the present majority's conclusion that under Murphy v. Florida (1975) 421 U.S. 794, the record in this case does not demonstrate that defendant was denied a fair trial, I concur in the judgment.

TOBRINER, J.

C O P Y

PEOPLE v. HARRIS

Crim. 20888

DISSENTING OPINION BY BIRD, C.J.

I respectfully dissent.

I.

These are terrible crimes of which appellant stands convicted, exceptionally cold-blooded and senseless. The reaction of San Diego County to their commission is understandable and, perhaps, even natural. The question before this court, however, is whether, amidst the clamor which attended that county's most notorious crime of the year, it is reasonably likely that appellant was not accorded a fair trial -- "the most fundamental of all freedoms"[1/] -- on the issues of guilt or of punishment.

Press coverage[2/] of appellant and his crimes began with his capture for bank robbery on July 5,

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1/ Estes v. Texas (1965) 381 U.S. 532, 540.

2/ This opinion uses the terms "press" and "publication" to refer not only to written journalism but also to the television and radio broadcast media.

1978. Two citizens observed appellant and his brother Daniel leave the bank after the robbery, and one of them followed the brothers as they drove back to their residence. This witness notified the police, and a combined "SWAT" and FBI team soon surrounded the house where appellant and Daniel were arrested. The police siege of the home was broadcast over local television, and the arrest of the robbers was the lead story in the San Diego Evening Tribune.3/

3/ With a circulation of 131,000 newspapers daily (except Sunday), the Evening Tribune is the second ranking newspaper in San Diego County. The San Diego Union has the largest circulation (200,000 daily; 300,000 Sunday). Other newspapers with substantial circulation in the county include the Los Angeles Times (41,000 daily; 52,000 Sunday), the Escondido Times-Advocate (31,000), the El Cajon Daily Californian (14,000), and the six Sentinel Newspapers (total local circulation 85,000). San Diego County has a population of about 1.7 million persons of whom 800,000 are registered voters. (Cal. Sect. of State, Rep. of Registration (Oct. 1978) p. 4.)

It is appropriate at this point to note some of the more obvious difficulties that arise when one attempts to determine the impact of publicity upon a jury pool by comparing a newspaper's circulation statistics with the gross population of the county. At the outset, it has been recognized that a newspaper's circulation statistics -- that is, the number of copies sold or given away -- significantly understates the number of persons actually reached by that paper. For example, a family would generally purchase only one copy of a newspaper to be shared among all family members.

On the other hand, since at least some individuals or businesses subscribe to more than one newspaper, one cannot obtain the number of newspaper subscribers simply by adding up the circulation statistics of each paper in the county.

(Fn. continued)

While initially the incident appeared to the press and, apparently, to law enforcement authorities to be "simply" a bank robbery, the situation quickly changed. Daniel told about the murders, laying the blame on appellant. The officers were shown the murder site by Daniel and the local television stations broadcast the recovery of the victims' bodies.

The story was front page news the following day (July 6th) in the San Diego Union (two front page stories), the Evening Tribune (four front page stories), and the Los Angeles Times (one story). The headlines described the crimes as "senseless murder" and observed that the community of Mira Mesa was "stunned." The Union mentioned that appellant was on parole from prison, that

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(Fn. 3 continued)

Finally, an assessment of the impact of adverse publicity upon a county's potential jury pool cannot accurately be obtained by comparing the number of persons reached by the publicity with the total population of the county. San Diego's gross population -- 1.7 million -- includes numerous persons who are statutorily ineligible to serve as jurors, for example, aliens and persons under the age of 18 years. A more realistic estimate of the jury pool's size might be registered voters. (See Code Civ. Proc., § 204e.) (There were 800,000 registered voters in San Diego County at the time appellant's jury was selected.)

Taking into account these various caveats, it seems reasonable to conclude that the several newspapers listed at the beginning of this footnote do have an extensive readership among persons constituting the jury pool of San Diego County.

at age 11 he had been arrested for cruelty to animals and burglary. Articles in the Evening Tribune related in both headline and text that appellant was on parole for a previous homicide and that his mother was herself on probation for bank robbery. An interview with appellant's parole officer was reported. In it, the officer revealed further details of appellant's manslaughter conviction and of his prior record for escape from a youth camp and for running away from home. Another official related that appellant had been on welfare at the time of the previous killing and "[i]t was hard to believe the filth" in his home.

That evening a local television station broadcast an interview it had conducted with appellant's father. In an emotional statement, the father told the reporter of a conversation he had had with appellant following his arrest in which appellant had admitted the killings. The story was picked up and disseminated by United Press International (UPI). (Shortly thereafter, appellant's father left the area.)

The stories by UPI for each of the following two days reported appellant's status as an ex-felon. Similarly, on July 6th, 7th, and 8th, the Associated Press (AP) coverage included references to appellant's prior record, including his juvenile record and his escape from the youth camp. AP also published its own interview with

appellant's parole officer and with the prosecutor in the prior manslaughter case. The prosecutor (now a judge) was quoted as stating that the prior homicide was a "stabbing death."

By July 7th, Daniel's confession to the police had been released to the press. It was reported that day in the Union, the Evening Tribune, the Times-Advocate, the Daily Californian, and the Vista Press, as well as by AP and three local television stations. The front page coverage in the Union included as headline "The Chilling Story of How 2 Boys Died." The text of the article reported the police account of Daniel's statements that appellant "thought up the whole thing" and that appellant shot one of the victims as he walked along carrying his hamburger. The Tribune's front page story was headlined "2 Boys Were Shot Without Warning." The text also noted the boys' bullet-riddled bodies and partially eaten hamburgers. A deputy coroner was reported as indicating that one of the boys had been shot without warning in the back.

The July 7th Union ran a separate story, headlined "Killings Suspect On Parole For '75 Slaying." Included in this article was an extensive interview with a member of the Imperial County Sheriff's Department. This officer detailed the facts surrounding appellant's prior

conviction and opined, "I knew he [appellant] was going to pull something. He beat that guy to death [in 1975] . . . beat him so hard on the head, he died of hemorrhaging."

The Union also published an editorial entitled, "Sorrow and Indignation," which stated: "We must bespeak the sense of grief and outrage that San Diegans share over the[se] mindless murders . . . . [¶] The circumstances of this tragedy are particularly appalling. . . . [¶] Because the horrible crime that snuffed out the lives of these young men could have happened to anyone, public sorrow and indignation are also tinged with fear." It further noted the "widespread belief that murderers may be paroled within a few years. This awful belief is well founded . . ." since the two victims' "murderer was not kept behind bars where he belonged." The editorial concluded: "If this crime, which could involve a confessed murderer paroled too early, can result in having punishment more nearly fit the crime in California, then [the victims] will not have died for nothing."

Further coverage in the Union, the Times, and the Daily Californian notified their readers that appellant's mother had been convicted for bank robbery. AP and UPI did the same. Appellant's prior manslaughter conviction was the subject of coverage by the Times-Advocate, the Vista Press, the Daily Californian, and AP.

On July 8th, the Union published another article concerning Daniel's confession and appellant's prior conviction. Headlines noted that the prosecution was seeking the death penalty for appellant. The article reported that there was considerable community outrage at the decision of the Community Release Board (C.R.B.) to parole appellant for the manslaughter conviction. A high ranking prison official was quoted as stating, "it's a reality that the Community Release Board made a mistake in this case . . . ."

That day's edition of the Evening Tribune carried similar reports about the prosecution's decision to seek the death penalty. Calling the offenses an "apparent willful execution of two innocent teen-agers," the chief deputy district attorney stated that "[t]he death penalty is designed to deal with this kind of offense." He also was quoted as stating that the evidence indicated that Daniel "did not personally participate" in the killings. The chief deputy further admitted that it might be difficult to empanel an impartial jury in the county after the published reports of Daniel's confession which laid the blame for the shootings on appellant.

The Times of July 8th contained the story of Daniel's confession, an interview with the judge who had been the prosecutor during appellant's prior manslaughter

proceedings, and an observation that the victims "appeared to have been shot down in cold blood." It again noted that appellant's mother had been convicted of bank robbery.

On Sunday, July 9th, the Union published a front page story and photograph of the funeral of one of the victims. The story quoted extensively from the minister who presided at the funeral and who described the perpetrators as "cruel, selfish, heartless people devoid of feeling and devoid of conscience." The article referred to appellant's status as a parolee for manslaughter, and it reiterated the prosecution's decision to seek the death penalty. The article then observed that no execution had been carried out in California in 11 years.

Later that same day, a television station conducted a one-question public opinion poll on its "Telepulse" show: "Do you agree with the death penalty demand in murder of two Mira Mesa youths?" Viewers phoned in their responses: 690 yes, 70 no.

On July 10th, both the Union and the Evening Tribune carried stories on the funeral of the second victim. The latter's article was on the front page. On July 11th, the Union published an article concerning the mother of one of the deceased boys and noted appellant was an "ex-convict on parole from a 1975 manslaughter conviction . . . ."

The Evening Tribune of July 12th carried a front page article under the headline, "Slain boy's mother finds words: It's senseless." The story stated that appellant was on parole for "a stabbing death." Accompanying the article was a large photograph of one of the deceased boys performing stunts on his bicycle. An article in the Times again referred to appellant's prior conviction and parole status. The Mira Mesa Sentinel carried one story about the victims' funerals and a second story and an editorial concerning the citizens who had aided in appellant's capture. The Sentinel reported that a sports scholarship had been set up by the local P.T.A. to honor the victims' memory and that another fund was collecting contributions for their families. It also related appellant's prior conviction, as did three local television stations. These stations also broadcast interviews with appellant's parole officer. Another newspaper editorialized: "With a past history of violent crime, and a murder conviction, to boot, what was Robert Harris doing on the streets?"

Two days later, the entirety of the Union's letters to the editor page was devoted to letters of outrage at the crimes and at the C.R.B.'s release of appellant. Appellant was called a "recidivist psychopath" and a "subhuman type." In the days which followed, other letters were printed demanding the death penalty for

appellant. The Union's editorial cartoon on July 17 showed pollution from a pipe labeled "Paroled Murderers" being poured into a stream labeled "Society."

In the next two days, the Union and the Tribune carried brief stories on the scholarship fund which had been created as a memorial to the two youths. And on July 19th, a television station broadcast an editorial, asking "whether this man, an ex-convict, should have been out of prison in the first place. Harris was paroled last January after serving less than two and a half years for beating to death a 19-year-old friend after a drinking spree. . . . Parole authorities rejected the warnings by an Imperial County sheriff's officer, familiar with the case, that Harris was a potential danger to society."

About this time, the publicity surrounding this case in San Diego County developed a new aspect, as the two major prosecutorial officers in the county became engaged in a sharp public dispute over which office would "get first crack" at prosecuting appellant. The local United States Attorney's office was responsible for the prosecution of the bank robbery offense, and the county district attorney for the homicides. Each office issued statements indicating what sentence appellant would likely obtain if convicted in its respective court. The United States Attorney claimed that the federal charges were an

"insurance policy" against appellant's early release by the parole board. After the district attorney's office responded that it was seeking the death penalty -- a punishment not available in the federal courts for bank robbery -- the United States Attorney held a televised news conference at which he expressed the opinion that the California death penalty law was unconstitutional.

The district attorney's office took the public position that if the federal charges were tried first, the state might lose the opportunity to try appellant and obtain a death sentence. The district attorney attempted to delay appellant's arraignment in federal court, and members of the office accused the United States Attorney of "political grandstanding." The United States Attorney responded that it was the county prosecutors who were "grandstanding."

When the federal authorities obtained a trial date of October 3, the Tribune noted this "tightens the race between the two jurisdictions as to which will be the first to try the case." An assistant district attorney described the "competition" between his office and the federal prosecutors as an "awkward situation." On August 7, the district attorney was able to have the state trial set on a date earlier than October 3, and the press reported that the district attorney had "moved ahead" in

his efforts to "beat federal authorities to the punch in prosecuting the Harris brothers."

Attorneys in the district attorney's office privately told the press that the motivation of the United States Attorney was "politics." They claimed "he is politically ambitious and . . . he knows the case will receive a lot of publicity . . . ." The United States Attorney responded that he was merely seeking "maximum protection of the community." Members of the district attorney's office were said to "scoff" at this justification.

On August 10, the Union published a lengthy article on the jurisdictional dispute, reporting that a senior federal parole officer "disputed" the United States Attorney's computation of appellant's federal sentence. This official, who calculated a prison term "far under" the term mentioned by the United States Attorney, "cannot understand why [the United States Attorney] is insisting on prosecuting the two brothers from Visalia." County prosecutors were again said to claim that federal involvement was "for the sake of publicity." An assistant legal counsel for the C.R.B. computed for the Union that "the least" appellant would serve in state prison would be a term of years well beyond the term calculated by the federal parole officer.

These events were duly reported by the Union, the Times, the Evening Tribune, and by the local television stations over a two and one-half week period from July 20th through August 10th, and beyond.

Coverage was not limited during this time period to the political dispute. Articles appearing in the Times of July 22d and 25th and August 8th and in the Union and the Tribune of July 22d and 25th and August 9th all reported further events in the case. On August 12th and 13th, the press reported that the confessions of both appellant and his brother had been introduced at their preliminary hearing. The Times story was headlined, "Harrises Bare Guilt to Them, Officers Testify." Portions of Daniel's confession were particularly publicized. According to police witnesses, appellant told Daniel that he wanted to kill everyone in the bank, and only after Daniel pleaded "there would be no more killings" did appellant relent. The Times carried Daniel's assertions that appellant had eaten the victims' hamburgers and had asked, "Wouldn't it be fun to pose as police officers and inform the next of kin that their son had been murdered?" Daniel was reported to be so fearful of appellant that he requested -- and was permitted -- to be kept in a jail cell separate from appellant.

Meanwhile, community reaction to the crimes was being expressed in other ways. The P.T.A.'s of seven schools combined to set up the memorial athletic scholarship in Mira Mesa. A local stereo store advertised that a portion of its income would be donated to that fund. Another memorial fund was set up to collect contributions to the boys' families. The bank which had been robbed gave rewards to three persons who had helped in the capture of appellant. It also took out large advertisements to laud the three, and the Tribune published an editorial commenting on these advertisements and again praising the three citizens. In its news broadcasts, a television station presented two of the citizens with its Good Citizen Award.

Numerous other details about the crimes, the court proceedings, appellant's background, and the victims were reported and reiterated in the press. Appellant and Daniel were consistently referred to as the "brothers from Visalia" (Tulare County). The two victims were described as popular teenagers and best friends. The father of one of the boys was a police officer who participated in appellant's arrest; a sister of one of the boys was inside the bank when Daniel and appellant robbed it. These facts and coincidences were widely disseminated by the press. Further coverage was given to statements by an officer in

Imperial County that he had unsuccessfully tried to prevent appellant's release on parole. A prison official was quoted as saying the C.R.B. had made a "mistake" by paroling appellant.

By mid-August members of the district attorney's office admitted to the press that this case received "the most news coverage of any this year in San Diego." Polls conducted that month by both the prosecution and defense more than substantiated this admission. Although differing considerably in their methodology, the pollsters for both sides found an extremely high public awareness of the crime. As one pollster stated, "this is the highest awareness factor in any of the polls that I have done regarding awareness of a particular alleged crime." Indeed, so well known was this case that by September 1st -- only five days prior to the hearing on the change of venue motion -- the Union published an editorial addressing the contemplated release from prison of two persons convicted of murder. The editorial was entitled "From Worry to Outrage" and stated: "San Diegans cannot forget the case of a paroled killer now charged with the vicious slaying of two teenagers, unfortunate enough to cross his path."

After the change of venue motion was denied, appellant filed a petition for a writ of mandate, seeking

to overturn that ruling. The petition was summarily denied by the Court of Appeal and by a four-to-three vote in this court.

Although diminished somewhat in frequency, the publicity given to this case by the press continued well past the change of venue motion. The extent and nature of the coverage between that motion and jury selection, can be gleaned by the fact that one prospective juror, who was called to try this case, indicated that he had been in Alaska during the entire summer and "didn't know a thing about [the case] until [he] returned in September," but he "read in the paper quite a bit about it since then." Although this juror recalled "not a great deal" of the details of the case, he had read enough to enable him to form the opinion that appellant was guilty. He was excused for cause.

Another indication of the extent of pretrial publicity comes from the voir dire in this case. Nearly 11 full court days were needed to obtain a jury of 12. Ninety-six prospective jurors were voir dired for those twelve positions. Of the 96, 90 percent had some prior information about the case, ranging from vague recollections to certainty of appellant's guilt. Twenty of the ninety-six were excused for cause due to the publicity, and appellant exhausted his twenty-six peremptory challenges.

Of those who had prior knowledge, most obtained their knowledge from publicity or discussions prior to coming to court, but four prospective jurors with no prior knowledge of the offense received information from other prospective jurors in the jury lounge. Indeed, of 13 jurors who were asked or volunteered information about what was occurring in the jury lounge, 11 indicated they had heard such discussions. One prospective juror told the court that "[m]any people expressed opinions with reference to guilt or innocence;" another indicated that in the jury lounge conversations she overheard, "their opinion had already been formed;" a third indicated he heard discussions "throughout the jury lounge."4/

Of the twelve jurors empanelled to decide the case, nine had some exposure to the pretrial publicity, and one juror, who had no prior exposure, heard jury room discussions. Among the twelve who served, one had seen the television interview with appellant's father, although this juror claimed to remember only that the father was, "really broken up;" he did not mention that the father told the television reporter his son had admitted committing the killings. A second juror indicated that

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4/ At one stage in the voir dire proceedings, the trial judge called in the prospective jurors and admonished them to stop discussing the case in the jury lounge.

this case "was duly noted by I think everybody in our circle when the incident, you know, came to the news." This juror stated that "I imagine I did" express or form an opinion regarding appellant's guilt, but this was not a "definite judgment[]," and she indicated she had no opinion on guilt "at this time." The remaining jurors admitted to having less knowledge than these two.

II.

The right to a "fair trial in a fair tribunal" is a basic component of due process.[5/] So basic is this principle that it has been termed "the most fundamental of all freedoms."[6/] "It is a right essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression. [Citations.]" (Nebraska Press Assn. v. Stuart (1976) 427 U.S. 539, 586 (conc. opn. of Brennan, J.).)

The Supreme Court has "insisted that no one be punished for a crime without 'a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.'" (Sheppard v. Maxwell (1966) 384 U.S. 333, 350, citation omitted.)

5/ In re Murchison (1955) 349 U.S. 133, 136.

6/ Estes v. Texas, supra, 381 U.S. at page 540.

Thus, whenever there appears a "reasonable likelihood" that the dissemination of potentially prejudicial news prior to the trial will prevent a fair trial, the trial must be postponed until the threat abates or the case is transferred to another county not so permeated with publicity. (Id., at p. 363; Maine v. Superior Court (1968) 68 Cal.2d 375, 383-384; Fain v. Superior Court (1970) 2 Cal.3d 46, 54.)

The courts have identified several dangers to a fair trial which are relevant to the present case. Such a danger can exist if there is bias against the accused, as when the community harbors hostility toward the suspect and/or when pretrial publicity is inflammatory. Recognizing that the press both reflects[7/] and shapes[8/] the community's pattern of thought, courts have looked to the nature and extent of press coverage as a means of ascertaining bias or hostility toward an accused. Courts have also looked to other factors from which community bias might be inferred, such as the status of the accused in the community, the status of the victim, the nature of the offense, the size of the community, and whether the case becomes involved in local politics.

7/ See Irvin v. Dowd (1961) 366 U.S. 717, 725.

8/ See Irvin v. Dowd, supra, 366 U.S. at page 726; see also Clifton v. Superior Court (1970) 7 Cal.App.3d 245, 251.

A second and separate kind of danger to a fair trial may result if extensive pretrial publicity has tended to establish the accused's guilt. As the Court of Appeal has stated, "[a] reasonable likelihood of unfairness may exist even though the news coverage was neither inflammatory nor productive of overt hostility. [Citation.] When a spectacular crime has aroused community attention and a suspect has been arrested, the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in his guilt." (Corona v. Superior Court (1972) 24 Cal.App.3d 872, 877.)

In determining the likelihood of this form of prejudice, the courts look again at the extent and content of press coverage. Especially significant in this regard is whether there has been widespread publicity concerning confessions or admissions by the accused, accusations by an alleged crime partner, prior similar criminal conduct by the accused, or statements by presumably knowledgeable officials indicating their belief in the accused's guilt.

The record in the instant case contains virtually every factor which this court has heretofore considered relevant to the resolution of a change of venue question. The record is replete with indications of community bias. The press reported the "stunned" reaction of the community

to the murders and consistently mentioned the "outrage," "disgust," "indignation," and "fear" shared by San Diegans as a result.

Only a few days prior to the hearing on the change of venue motion, the county's largest newspaper wrote that "San Diegans cannot forget" these "vicious" killings. Appellant was described by members of the community as "cruel, selfish, heartless" and "devoid of feeling, and devoid of conscience." A police officer was widely quoted as stating appellant was dangerous, unstable, and violent. The press reported that even appellant's brother Daniel was afraid of him and that Daniel "was happy to be [in confinement] away from his older brother." Press coverage of even routine court appearances frequently mentioned that appellant was brought to court in chains. (Cf. People v. Duran (1976) 16 Cal.3d 282.)

Appellant was graphically portrayed in a cartoon as sewage polluting the community. In the letters to the editor, he was called a "subhuman type," a "recidivist psychopath," a "dreadful man," and a "beast." There were demands for his execution, and an announcement that citizens will "speak out and act if justice is not served . . . ."

Appellant's criminal history was a constant subject of public attention. The press frequently noted his arrest at age 11 for cruelty to animals. Other arrests and convictions for auto theft, runaway, escape from youth camp, burglary, and parole violation were brought out. His prior status as a welfare recipient and the "filth" of his house were deemed newsworthy. Even his mother's conviction for bank robbery was prominently featured. Most damaging, however, was appellant's prior manslaughter conviction, the details of which were repeated many times. The press carried interviews with a judge who had been the prosecutor for this offense, with police officers involved in its prosecution, and with his parole officer. Appellant was referred to by the leading newspaper as a "paroled killer."

The community was incensed that the C.R.B. had paroled appellant. This anger was expressed in editorials, in letters to the press, in comments by local law enforcement officials. The press recounted the efforts of a police officer in another county to prevent appellant's parole. Stories were carried attributing to prison officials the admission that it had been a "mistake" to release appellant. Editorials attacked the "feeble excuses" and "lame responses" of the C.R.B. for releasing appellant.

In prior decisions, this court has found the status of the accused and the victim to be significant. For example, in Fain v. Superior Court, supra, 2 Cal.3d at page 52 -- a case in which a change of venue was ordered -- the court noted that the defendant "had been a resident of the . . . area [where the crime took place] for only a few months prior to the crimes, and had not been integrated into the community." The same can be said of appellant; indeed, appellant and his brother Daniel were routinely referred to as "brothers from Visalia." Appellant's contacts with yet another county (Imperial) were amply emphasized in connection with the reportage of his prior manslaughter conviction there.9/

In Fain, this court also considered the fact that "the victims were popular local teenagers, whose fate drew expressions of public sympathy and aroused hostility towards the defendant[]." (2 Cal.3d at p. 51.) In the

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9/ The majority opinion asserts that appellant "lived in the same community as his victims and worked in San Diego." (Maj. opn., ante, at p.____.*) This assertion does not accurately reflect the way appellant was portrayed by the press. Usually, he was said to be "from Visalia." According to one newspaper in Mira Mesa, appellant was a "transient renter." At the very least, appellant was no more integrated into the community than was the defendant in Fain, supra, whose minimal community ties were held to be a factor favoring a change of venue.

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* Typed opn., p. 12.

present case, too, the victims were also teenagers popular in their community, best friends on their way to go fishing when kidnaped; and one of them was the son of a police officer.10/ Public sympathy and tribute came in many forms. The Union noted the "hundreds of people -- strangers, mostly -- who rushed to [the] comfort" of the victims' families. Funeral arrangements were made for one family by a church of another faith.

A college scholarship fund was set up in memory of the boys by the P.T.A.'s of seven schools, and another fund collected donations for their families. The existence of these funds was publicized countywide. A local retail establishment advertised that it would donate portions of its income to the scholarship fund. Rewards were given to citizens responsible for appellant's capture. The bank took out advertisements lauding them, the county's largest newspaper praised them, and a major television station gave them its Good Citizen Award.

This court has also observed that the nature and gravity of the crime, as reported in the press, " may

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10/ Prior to the deaths of the boys, neither they nor their families were known outside the community of Mira Mesa. Their virtues were, however, made known to the county at large following their deaths, and the community's warm sympathy was displayed countywide. As the mother of one of the boys explained, "the whole of San Diego was just fabulous."

reasonably be taken into consideration in determining the risk of prejudice." (Fain v. Superior Court, supra, 2 Cal.3d at p. 54; see also Maine v. Superior Court, supra, 68 Cal.2d at p. 385.) Appellant's was a capital crime of utmost gravity. Moreover, the shocking nature of the case was thoroughly explored in the press. A deputy coroner told the press that one boy had been shot without warning in the back and that the other boy was flushed out of hiding and killed. At a press conference, the prosecutor termed the slayings an "apparent willful execution of two innocent teenagers." Gruesome details were frequently noted, from appellant's eating the victims' food to his desire to notify the boys' families of the slayings.

In addition, this case took on political overtones as the two major prosecutorial offices in the county engaged in public maneuvering in order to be first to bring appellant to justice. (Cf., People v. Tidwell (1970) 3 Cal.3d 62, 71; see also Maine v. Superior Court, supra, 68 Cal.2d at pp. 386-387.) Each side in the dispute seemed to boast about the severity of the sentence appellant would receive in its jurisdiction. Each accused the other of "grandstanding." The United States Attorney was said to be "playing politics." The press perceived the situation as a "race" between two antagonistic competitors.

Much of the publicity discussed thus far not only revealed community bias toward appellant but also assumed his guilt: the prior conviction for homicide (see People v. Fries (1979) 24 Cal.3d 222, 230); the reported details of the crime; and the expressions by the prosecutor and other local officials as to appellant's guilt. In addition, however, the press on numerous occasions carried the story of Daniel's statements, which laid the full blame for the murders on appellant. Appellant's own admission to the crimes was carried over television, via an emotional interview with appellant's father. This broadcast was seen by at least one of the jurors who decided appellant's guilt. His confession was disclosed when the preliminary hearing transcript was made public.

One relevant factor which this court has considered in the past but which is not present in the instant case is the small population of the community from which the jury is drawn. San Diego County is populous, in terms of both absolute numbers and voter registration. (Cf., ante, fn. 3.) However, "population size alone is not determinative." (Fain v. Superior Court, supra, 2 Cal.3d at p. 52, fn. 1; see also Smith v. Superior Court (1969) 276 Cal.App.2d 145, 150; Lansdown v. Superior Court (1970) 10 Cal.App.3d 604, 609-610.)

Contrary to Fain, Smith, and Lansdown, today's majority opinion appears to find that the size of the community is controlling. (Maj. opn., ante, at p.____.*) The majority blithely ignore the cases in which changes of venue have been ordered from populous counties, including one county which is considerably larger than San Diego. (See Smith v. Superior Court, supra, 276 Cal.App.2d 145 [L.A. County, population 7 million];[11/] Lansdown v. Superior Court, supra, 10 Cal.App.3d 604 [Kern County, population 300,000].) The fallacy of the majority's reasoning was fully set forth in Smith: "Carried to its logical conclusion, the [majority's] argument, if valid, would require that all motions for a change of venue in [a populous county] must be denied because of its population, regardless of the amount of pretrial publicity which surrounds a notorious criminal case. This contention is disposed of by the court in Maine in the following language: 'We do not intend to suggest, however, that a large city may not also become so hostile to a defendant, as to make a fair trial unlikely.'" (276 Cal.App.2d at p.

11/ Smith was cited with approval on this point in Fain v. Superior Court, supra, 2 Cal.3d at page 52, footnote 1.

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* Typed opinion at page 12.

150, quoting from Maine v. Superior Court, supra, 68 Cal.2d at p. 387, fn.13.)

The majority's apparent elevation of the population factor to preeminent status is all the more unfortunate in this case, because, unlike the Manson case[12/] upon which the majority partially rely, the pervading publicity surrounding the crimes was limited to two counties at most. Thus, alternative forums for appellant's trial were readily available.

The majority also assert that the pretrial publicity in this case did not prejudice appellant at trial. They seek to prove this proposition by reference to the voir dire examination of the 12 jurors empanelled to try this case. This effort to establish a lack of prejudice is unpersuasive.

As this court has long recognized, the fact that "it was possible to select [jurors] who thought they could try the case fairly does not sustain the conclusion that a fair trial could be had." (People v. McKay (1951) 37 Cal.2d 792, 798, emphasis added.) Primary among the reasons for this rule are the difficulties inherent in identifying, uncovering, and preventing juror prejudice

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12/ People v. Manson (1976) 61 Cal.App.3d 102.

flowing from pretrial publicity.[13/] Thus, jurors' declarations of impartiality are not dispositive. (Sheppard v. Maxwell, supra, 384 U.S. at p. 351; People v. Tidwell, supra, 3 Cal.3d at p. 73.)

The United States Supreme Court recently articulated alternative tests for determining when due process requires a conviction to be set aside on appeal as the result of pretrial publicity. (Murphy v. Florida (1975) 421 U.S. 794.) Under these tests, the refusal to grant a motion for a change of venue will require reversal if, but only if, prejudice at trial is presumed, is inherent, or is inferrable.

Under the first test in Murphy, prejudice is "presumed" and a judgment of conviction must be reversed when "the influence of the news media . . . in the community at large . . . pervaded the proceedings."[14/]

13/ See, inter alia, Irvin v. Dowd, supra, 366 U.S. at pages 727-728; Sheppard v. Maxwell, supra, 384 U.S. at page 362; Murphy v. Florida (1975) 421 U.S. 794, 803; Nebraska Press Assn. v. Stuart, supra, 427 U.S. at pages 566-567; Maine v. Superior Court, supra, 68 Cal.2d at pages 380, 382-383; People v. Tidwell, supra, 3 Cal.3d at page 73; Lansdown v. Superior Court, supra, 10 Cal.App.3d at page 609; Corona v. Superior Court, supra, 24 Cal.App.3d at pages 878-879, 881.

14/ According to the complete quotation from Murphy, prejudice is presumed in cases where "the influence of the news media, either in the community at

(Id., at pp. 798-799.) Murphy cited Rideau v. Louisiana (1963) 373 U.S. 723 as a proper application of this "presumed prejudice" test. (See 421 U.S. at pp. 798-799.) In Rideau, the defendant had confessed under police interrogation to the murder of which he stood convicted. A twenty-minute film of his confession was broadcasted three times by one television station in the community where the crime and the trial took place. One of the broadcasts was viewed by an audience estimated to be about 50,000 persons in a commmunity of 150,000.

Believing that the televised film "in a very real sense was Rideau's trial" to those who viewed it, the Supreme Court reversed the conviction "without pausing to examine a particularized transcript of the voir dire examination of the members of the jury. . . ." (Rideau v. Louisiana, supra, 373 U.S. at pp. 726, 727, initial emphasis in original, subsequent emphasis added.) The court held that "due process of law in this case required a trial before a jury drawn from a community of people who

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(Fn. 14 continued)

large or in the courtroom itself, pervaded the proceedings." (Emphasis added.) Since this language is framed in the alternative and since there is no claim in the present case of overbearing press influence "in the courtroom itself," that portion of the quotation is deleted. (Cf. Estes v. Texas, supra, 381 U.S. 532; Sheppard v. Maxwell, supra, 384 U.S. 333.)

had not seen and heard Rideau's televised 'interview.'" (Id., at p. 727.)

In situations where prejudice is not "presumed," the Murphy court held that a "totality of circumstances" test should be applied. (421 U.S. at p. 799.) Under this test, the appellate court determines whether either (1) "the jury-selection process . . . permits an inference of actual prejudice" or (2) "the setting of the trial was inherently prejudicial . . . ." (Id., at p. 803.) The court explained that even where no actual prejudice on the part of the trial jurors can be shown or inferred from the voir dire transcript, this factor "might be disregarded in a case where the general atmosphere in the community . . . is sufficiently inflammatory . . . ." (Id., at p. 802.)

The instant appeal undeniably involves one factor similar to that which invoked the "presumed prejudice" test in Rideau: a local television station broadcast a dramatic interview with appellant's father in which the father tearfully revealed appellant's confession to him. While this interview was not broadcast three times as in Rideau, and did not portray appellant himself, nevertheless this publicity must at least be considered to have substantial impact under the "totality of circumstances" test. This impact would be especially relevant to the empanelled juror who admitted to viewing the broadcast.

In my view, appellant has more than met the "totality of circumstances" test. An examination of the jury-selection process as a whole -- which Murphy requires, see 421 U.S. at page 803 -- discloses that 90 percent of the prospective jurors had been exposed to pretrial publicity or discussions about the case.15/ Many jurors admitted they had felt horror or shock when the crime was disclosed in the press. And as one juror frankly admitted, it would take some "mind-rendering to erase maybe what I have felt." Indeed, one of the twelve jurors finally empanelled to try appellant's case stated "I imagine I did" form or express an opinion as to his guilt as a result of pretrial publicity. She stated, however, that she had no opinion "at this time" concerning guilt or innocence. She did not indicate what, if anything, had occurred to cause her to retreat from her initial opinion.

15/ This figure of 90 percent probably understates the actual proportion of such jurors. Courts have noted that jurors may not admit they have knowledge of pretrial publicity. (See, e.g., Corona v. Superior Court, supra, 24 Cal.App.3d at pp. 878-879.)

There is a strong indication that the jurors in this case were not immune from this tendency. According to a newspaper account of the preliminary voir dire of the first 12 jurors, when asked if they had read or heard about this case, "All 12 jurors raised their hands, some of them reluctantly and only after looking around to see the response of the others."

An especially disturbing aspect of the jury-selection process in this case was the report during voir dire of discussions by potential jurors in the jury lounge. According to the record, many people expressed the opinion that appellant was guilty. True, the trial judge did at one point call the jurors back into the courtroom specifically to admonish them against such conversations. However, such an admonishment is a double-edged sword. While it may deter future jury room discussions, the stern admonishment also reduces the likelihood that jurors, subject to voir dire thereafter, will admit to having heard or participated in these discussions.

In the final analysis, however, it is the inherently prejudicial setting of this case that tips the scales in favor of reversal. When the accused is portrayed as "sewage" polluting society, when the public is treated to the sorry spectacle of prosecutorial offices publicly vying with each other to have "first crack" at convicting the accused, when the accused's prior homicide conviction becomes a routine part of the continuing press coverage of the case, when the state prison system is assailed for its "mistake" in releasing the accused and a public official admits the same, when the prior record of the accused's mother is deemed to be newsworthy, when a

television station broadcasts the father's tearful recitation of his son's confession, then "the setting of the trial [is] inherently prejudicial." (See Murphy v. Florida, supra, 421 U.S. at p. 803.)

Under the totality of the circumstances, this case should be reversed so that a fair trial may be conducted.

III.

There are some particularly disturbing ramifications of the majority's holding in this case on the penalty phase decision of a capital trial.

The pretrial publicity in this case is important for another reason. The underlying but unmistakable message of the pretrial publicity as a whole was that the only appropriate punishment for appellant was death.16/ This leads to an important point.

At the penalty phase of a capital trial, the jury has the especially delicate task of deciding whether the accused should live or die. Jurors are called upon to

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16/ The message comes through in this fashion: appellant has killed before, yet he was released from prison into society by blundering or incompetent prison officials; he has killed again, thus proving he will forever be dangerous and is no more than refuse in our community; the only way to prevent a second mistaken release and yet another tragic killing is to take the matter away from the control of the prison officials; this can be done only by executing the appellant.

"express the conscience of the community . . . ."
(Witherspoon v. Illinois (1968) 391 U.S. 510, 519.) It is undeniable that jurors making the penalty decision are entitled to, and in fact must of necessity, exercise considerably more subjective discretion in performing this task than they do in reaching a decision on guilt or innocence. (See Adams v. Texas (1980) ____ U.S. ____, ____ [65 L.Ed. 2d 581, 590].)

The conscience of the community is expressed by assuring that the pool from which penalty phase jurors is drawn accurately reflects the community as a whole. In this way, the discretion exercised by those jurors will, in the long run, closely approximate that which would be exercised by the community as a whole. (Cf., generally, Hovey v. Superior Court (1980) 28 Cal.3d 1, 73-74.)

However, when a case produces a great deal of potentially prejudicial publicity, certain members of the community become ineligible to serve at the trial as a consequence of that publicity. They are removed from the pool of persons from which, inter alia, the penalty phase jury is drawn. Certain types of individuals tend to be removed from the pool as a result of pretrial publicity. It has been suggested that an "honest juror" will frequently find himself excluded. (See Corona v. Superior Court, supra, 24 Cal.App.3d at p. 879.) One might further

speculate that the "self-aware" juror may also tend to be excluded. But one type of juror will, almost by definition, tend to be removed in disproportionate numbers from the jury pool: the jurors who are informed and knowledgeable about current affairs.

Whatever the impact of the removal of these jurors upon the guilt determination, the impact on the penalty phase is likely to be devastating. At that phase, where jurors are given the most discretion and where the jury verdicts are supposed to express that undefinable quality known as the conscience of the community, the law removes from the jury those who are most informed about the community. Since extensive publicity tends to occur in connection with important cases, this removes these individuals in the very cases which are most significant.

There is no failsafe "solution" to this irony. However, a frank recognition of its existence would lead us to consider ways of mitigating its effect where possible. Such mitigation is readily available in capital cases like the present one, since intensive pretrial publicity was confined to a few counties in the state.

A change of venue to another county would have substantially restored the jury pool in this case to that which is available in a case of less notoriety. A change of venue would have made it possible for this court to

feel more secure that the verdict expressed in this case truly reflected the conscience of our California community.

IV.

Before the state can put to death one of its citizens, the accused must be found guilty after a fair trial by a jury selected from a cross-section of the community. In this case, appellant received neither. Under our case law, if a fair trial has been denied, the conviction must be reversed regardless of the evidence of the accused's guilt. (Irvin v. Dowd, supra, 366 U.S. at p. 722; People v. Tidwell, supra, 3 Cal.3d at p. 76; Maine v. Superior Court, supra, 68 Cal.2d at p. 384; People v. McKay, supra, 37 Cal.2d at pp. 798, 800.)

As this court explained more than a century ago, "The prisoner, whether guilty or not, is unquestionably entitled by the law of the land to have a fair and impartial trial. Unless this result be attained, one of the most important purposes for which Government is organized and Courts of Justice established will have definitively failed. Cases sometimes occur, and this would appear to be one of them, in which the very enormity of the offense itself arouses the honest indignation of the community to such a degree as to make it apparent that a dispassionate investigation of the case cannot be had.

Under such circumstances the law requires that the place of trial be changed." (People v. Yoakum (1879) 53 Cal. 566, 571.)

BIRD, C.J.

I CONCUR:

MOSK, J.

LERK'S OFFICE, SUPREME COU
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

RECEIVED MAR 23 1981

MAR 20 1981

I have this day filed Order

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REHEARING DENIED

In re: Cal Res No. 20588

vs.

Harris

Respectfully,

Clerk

No. 80-6702

JUN 24 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ROBERT ALTON HARRIS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ORIGINAL COPY

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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